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United States Court of Appeals

For the Second Circuit

In the Matter of

LONG ISLAND LIGHTING COMPANY
QUEENS BOROUGH GAS AND ELECTRIC COMPANY
NASSAU & SUFFOLK LIGHTING COMPANY

ENNIS M. NICHOLS and HAROLD G. ARON,
Respondents-Appellants.

ENNIS M. NICHOLS, individually and on behalf of other Stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of Long Island Lighting Company and COMMON STOCKHOLDERS COMMITTEE OF LONG ISLAND LIGHTING COMPANY,
Plaintiffs-Appellants,

against

HARRY A. ALKER, et al.,
Defendants-Appellees.

BRIEF AND APPENDIX FOR APPELLANTS

INDEX TO BRIEF

	PAGE
Statement	1
Prior History	3
Questions Involved	7
Analysis of Orders Appealed From	13
Summation:	
POINT I—The District Court in its order in Civil Action 10413 has aided and abetted the defendants in Civil Action 14890 in evading the decision of this Court on June 7, 1956	16
POINT II—The District Court in its order dismissing Civil Action 14890 has violated and overruled the decision and order of this Court on June 7, 1956	16
Conclusion	23
Attachments	25
Attachment A	27
Attachment B	28
Attachment C	29
Attachment C-1	30
Attachment D	33
Attachment E	35

Table of Cases Cited

PAGE

Alabama Public Service Commission v. Southern Railway Company, 341 U. S. 341 17

Halstead v. S.E.C. (divided court), 182 Fed. 2d 660 21

Long Island Lighting Company, In re:
89 Fed. Supp. 513 4
148 Fed. 2d 252 ..... 3, 11, 17
183 Fed. 2d 45 ..... 3, 4

Nichols v. Long Island Lighting Company:
207 Fed. 2d 931 23
211 Fed. 2d 393 23

Nichols, et al. v. S.E.C. and Long Island Lighting Company, 211 Fed. 2d 412 ..... 4, 22

Sheppard v. Ohio—Memorandum of Mr. Justice Frankfurter, November 13, 1956, 352 U. S. 910 ... 2, 14

U. S. v. Morgan, decided January 4, 1954, 346 U. S. 503 ..... 2, 5

Other Authorities Cited

Appendix to Opinions, Mixed Claims Commission, U. S. v. Germany, 1933-1939, at page 1127 ..... 5, 17

Federal Rules of Civil Procedure, Section 60(b) 5

INDEX TO APPENDIX

	PAGE
Extract from Docket Entries in Action No. 10413	1a
Notice of Motion in Action No. 10413 for Supplemental Injunction Order	2a
Affidavit of Betram D. Moll, Read in Support of Foregoing Motion	4a
Transcript of Hearing on Foregoing Motion	13a
Supplemental Order Appealed From in Action No. 10413	28a
Notice of Appeal in Action No. 10413	34a
Extract from Docket Entries in Action No. 14890 ...	35a
Notice of Motion in Action No. 14890 for Order That Court Proceed to Trial of Issues of Fraud and Conspiracy	36a
Petition of Ennis M. Nichols, Read in Support of Foregoing Motion	40a
Opinion of United States Court of Appeals, for the Second Circuit	47a
Affidavit of Betram D. Moll, Read in Opposition to Foregoing Motion	49a
Transcript of Hearing on Foregoing Motion (same as printed herein at pages 13a to 28a).	
Order Appealed From in Action No. 14890	53a
Notice of Appeal in Action No. 14890	54a

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BRIEF FOR APPELLANTS

Statement

Involved herein are the appeals from two final orders of Abruzzo, J., dated October 26, 1956 (In re Long Island Lighting Company) and October 25, 1956 (Nichols vs. Alker), stated in order of their importance:

1. Denying plaintiffs' motion that the District Court proceed to take testimony as to after discovered evidence

of the fraud and conspiracy as set forth in the complaint in Nichols et al. vs. Alker et al., pursuant to the decision of this Court on that case, on June 7, of last year.

2. Granting in the original reorganization proceeding, entitled as above, a supplemental order upon motion by the defendants in Nichols vs. Alker, enjoining Ennis M. Nichols and the attorney Harold G. Aron, from taking further proceedings based on the allegations of the complaint on Nichols vs. Alker.

Both motions were heard by Judge Abruzzo simultaneously on October 22, 1956, and the stenographic minutes of the hearing were at his direction, incorporated in and made a part of both orders.

These appeals bring before the Court the following major questions:

1. Appellants' right to introduce *after discovered evidence,* in accordance with this Court's decision of June 7, 1956, which the District Court has refused to receive, in complete defiance of this Court's opinion. (See transcript of hearing attached to the orders appealed from.)

2. Appellants' right to avail of *after discovered* law which was unknown to this Court, as well as plaintiffs' counsel, when in 1952 it denied a petition to set aside its affirmance of the Enforcement Order in the reorganization of the Long Island Lighting Company. (*U. S.* vs. *Morgan,* decided January 4, 1954, 346 U. S. 503, at pages 504, 505 and 507.)

3. The error below in the District Court's recital of the denial of the petition of certiorari herein as a ground for denying the motions appealed from. (*Sheppard* vs. *Ohio*—memorandum of Mr. Justice Frankfurter, November 13, 1956, 352 U. S. 910.)

4. The propriety of the injunction granted below by evasion of this Court's denial of an injunction in its deci-

sion of June 7, 1956, through the device of resort to Civil Action 10413, which was terminated by this Court's decision in 1952, affirming the final enforcement order (197 Fed. 2d 709, 710) and which has never been reopened and with no application to reopen it by the defendants here in Civil Action No. 14890, who were not parties and were strangers to that proceeding No. 10413.

Prior History

The history of the Long Island Lighting Company reorganization is more than familiar to this Court and has been repeatedly reviewed by it, most recently in the decision of this Court, in the above entitled action, argued October 10, 1955 and decided February 14, 1956. In view of this comprehensive opinion and the earlier opinion of Judge Kennedy to which it alludes, it seems supererogatory to review the facts or cite earlier decisions and dicta although they omit reference to many authorities which to appellants' counsel seemed relevant.

This matter first came before this Court in 1944 (148 Fed. 2d 252) under circumstances revealed nearly a year after it had affirmed, over plaintiffs' opposition, the Enforcement Order in testimony, in a fee fixation proceeding, before the SEC covering a stenographic transcript of more than 100 pages which these plaintiffs have repeatedly and unsuccessfully sought to bring to the attention of this Court. (Transcript of hearings, SEC files 54-156.) After the 1944 decision (183 Fed. 2d 45), pursuing the conspiracy alleged in the complaint now here, the then and now Long Island management waived the exemption which it was granted at the time of the enactment of the Public Utility Holding Company Act, and voluntarily submitted to the jurisdiction of the SEC in complete disregard of its reorganization in 1944, as an intra-state company by the Public Service Commission of New York. A petition under 11 E of PUHCA was filed on April 25, 1945.

Having thus acquired abortive jurisdiction upon the patently false pretense that Long Island Lighting Company was a holding company, engaged in interstate commerce, hearings were held over the next three years before the SEC and on November 15, 1949, the SEC filed an application in the United States District Court for the Eastern District of New York for an order to enforce a plan pursuant to the Public Utility Holding Company Act, in accordance with findings of the SEC dated November 16, 1949. It is to be underlined that on August 21, 1951, after the long plotted enforcement order, through action of this Court had become final. SEC entered an order finding the Long Island Lighting Company no longer subject to its jurisdiction.

In these proceedings which first came to the attention of the plaintiffs in 1948, the plaintiffs were then allowed, as a matter of grace, by the SEC, a "limited participation". On February 17, 1950, the District Court, based on an opinion by Judge Kennedy, dated February 10, 1950, entered an enforcement order (89 Fed. Supp. 513). Thereafter, an appeal was taken by the plaintiffs to this Court which, in the first pronouncement, remanded the case to the District Court but a few days later, on an application of the SEC, and without hearing the plaintiffs, reversed its earlier decision and affirmed the enforcement order (183 Fed. 2d 45). There followed a fee fixing proceeding which came before this Court and was approved as modified by it in 1954 (211 Fed. 2d 412). In the course of the hearings, in the fee proceedings, there was disclosed for the first time the collusion, conspiracy and fraud by which the SEC had been induced to make its findings, among other things on the Company's representation that the prospective normal annual net income for the Company and its subsidiaries, when consolidated, would not exceed $3,500,000—they now have reached over $12,000,000—(by virtue of no windfall or unanticipated development) and in reliance on the Company's claim to a deficiency in its depreciation reserves

of $10,263,969, fixed a year later by the Public Service Commission of New York, at $3,219,453.51.

This Court in 1952 denied an application by these plaintiffs to set aside its affirmance of the enforcement order since which time these plaintiffs have not challenged or attacked the Enforcement Order. This Court then said:

> "Petition denied on the ground that no fraud or other basis for relief under Rule 60(b) F. R. C. P. is made to appear."

This opinion is dated May 21, 1952 and plaintiffs asked reargument for the reason that they had not moved under Section 60(b) and could not have done so because of the lapse of time. To this, this Court responded in the following opinion:

> "Whether petitioners have a right to proceed by motion or independent action in the District Court without obtaining leave by this Court is a matter on which we express no opinion. In re Long Island Lighting Co., 197 F. 2d 709, 710."

As to the above quoted decision of this Court, it must be noted as the record shows and as pointed out in their motion for rehearing, the plaintiffs' petition was not based on Section 60(b) of F. R. C. P. for the reason that the time for making such motion had elapsed before the discovery of the fraud. Counsel, being then unaware, as was this Court, that the writ *coram nobis* had not been superseded by Section 60(b), based the motion on the inherent power of any tribunal to frustrate its own defraudation, stated by Justice Owen Roberts (see *infra*, p. 17). Had the 1954 decision of the United States Supreme Court in the *Morgan* case, *infra*, which went up from this circuit been known in 1952, much of this litigation which has flowed from the fraudulent reorganization of the Long Island Lighting Company might have been avoided.

Having discovered, for the first time, on the fee applications nearly a year later positive evidence of fraud and conspiracy, the plaintiffs thereupon, as seemed to have been indicated as the proper course in the decision of this Court just referred to, instituted a common law action against the Long Island Lighting Company, the complaint in which has never been answered, although Judge Inch denied a motion to dismiss and for summary judgment made by the defendants. However, in this action, the SEC asked to intervene, their petition was granted and on their motion to dismiss, Judge Inch dismissed the complaint upon the ground that the filing of the action was forbidden by the injunction contained in the Enforcement Order but left plaintiffs free to proceed as they might be advised. Plaintiffs thereupon filed a substantially identical complaint against the officers and directors of the Long Island Lighting Company individually, which is the case now here. Judge Galston, in the District Court, dismissed this complaint on the ground that it was sham because of the rule of *res judicata* and recommended that the plaintiffs' then attorneys of record be cited for contempt. This decision of Judge Galston came before this Court on appeal by the plaintiffs in October, 1955. On February 14, 1956, in a lengthy opinion by Judge Waterman, not concurred in as to its reasoning by Judge Frank, this Court affirmed the order of Judge Galston dismissing the complaint. Plaintiffs thereupon moved for reargument which motion was denied; plaintiffs thereupon moved for an order directing the District Court to take testimony, within the bounds of after-discovered evidence, of fraud and collusion as alleged in the complaint, which, like the earlier complaint has never been answered by the defendants. The defendants simultaneously moved in the original reorganization proceeding to enjoin the plaintiff Nichols and counsel for the Committee from further prosecuting the litigation. This Court decided this latter motion on the 7th day of June, 1956, denied the defendant's motion for an injunction and

directed the District Court to inquire as any "*substantial evidence of fraud which was not obtainable by due diligence in time to present either in the original reorganization proceedings or in the subsequent petition filed in 1952.*"

Questions Involved

The primary issue involved is whether the action of the District Court is in conformity or conflict with the decision of this Court, a certified copy of which was filed in the Office of the Clerk of the District Court prior to plaintiffs' motion now before this Court.

The second issue is one of fact: Are the plaintiffs in possession of after-discovered evidence as that is defined in this Court's opinion of June 7, 1956?

Had the plaintiffs been allowed to offer any evidence called for by this Court's last decision, they were and are in a position to show through the testimony of the witnesses designated in the motion papers and by evidence in writing:

(1) That the Company's official accountings to the SEC, P.S.C. and the New York Stock Exchange show, as to earnings since this Court affirmed the enforcement order, that the testimony given by the defendants, or some of them, before the SEC and repeated to the District Court and this Court, as to the prospective earnings of the reorganized consolidated Company, were under-estimated by 400% and that this misrepresentation by the defendants, or some of them, was made knowingly and with intent to defraud the plaintiffs and mislead the SEC.

(2) That these defendants or some of them as early as 1942, formed a conspiracy under legal pretense to invade the State of New York and, strip it of jurisdiction over the Long Island Lighting Company, to accomplish its dissolution without the knowledge or consent of its common

stockholders and to confiscate their holdings now worth in excess of $50 million, under the leadership in this Court in 1944 of the defendant David K. Kadane, then appearing as Special Counsel for Securities & Exchange Commission.

(3) That these defendants or some of them conspired and did all in their power as officers, directors and management to sell the assets of LILCO to the Consolidated Edison at a minor fraction of their true value.

(4) That these defendants or some of them wilfully and knowingly gave false testimony before the Securities & Exchange Commission.

(5) That for over four years, these defendants or some of them owning less than 1% of the common and only voting stock deliberately, and wilfully in aid of their conspiracy prevented any meeting of the common stockholders after 1944, which would inevitably have resulted in their ouster and ended the proceedings before the SEC and by artifice, device and misrepresentation induced the SEC to retard and frustrate the efforts of these plaintiffs to compel a stockholders' meeting in exact compliance with the laws and statutes of the State of New York.

(6) That by knowingly false representations these defendants or some of them induced the SEC to find that the foreseeable future earnings of LILCO would not exceed $3,500,000 as against its present annual earnings of $12,000,000 and to believe that the Company was facing a rate reduction, which has not occurred, by the Public Service Commission of New York.

(7) That these defendants or some of them, after this Court had denied SEC jurisdiction of the LILCO, induced SEC to cancel the exemption from the PUHCA which it had granted LILCO in 1936 as an entirely intra-State corporation, upon the voluntary submission of the Board of Directors without notice to or consent by its stockholders.

(8) That in the proceedings, pending before the PSC of New York, instituted but concealed by these defendants when the proceedings were going on before SEC, LILCO claimed a depreciation reserve of $10,263,969 actually finally fixed by PSC at $3,092,276 on September 13, 1951, nearly two years after the SEC had announced and enforced a reorganization plan based on a depreciation reserve of $10,362,969.

(9) That the immense growth in earnings result in large part from increased allowances of natural gas by the Federal Power Commission, applied for but not granted until after the close of the SEC proceedings.

(10) Facts and circumstances surrounding and inducing the SEC to refuse plaintiffs' right to raise among themselves loans and advances to meet out-of-pocket expenses for printing, expert testimony and other disbursements necessary to the prosecution of this action.

(11) Facts and circumstances surrounding and inducing the SEC to delay and thereby frustrate a stockholders' meeting, called in accordance with the Laws of the State of New York for the 15th day of September, 1949, none having been allowed by the management after 1944.

(12) Facts and circumstances under which immediately on the consummation of the SEC reorganization the investment banking firm of William C. Langley, Chairman of the Preferred Stockholders Committee represented by defendant Jackson, one of the prime movers in the reorganization *without competitive bidding*, was permitted to buy at private sale, preferred stock of the reorganized Long Island Lighting Company at a price much below its market value with a huge profit to said Langley and undisclosed associates, possibly as high as half a million dollars. (See Memorandum of present counsel (page 10) filed in District Court, April 15, 1953 in Civil Action No. 10413.)

It remains for counsel to answer the charges made by defendants' counsel in oral argument before Judge Abruzzo as recorded in the stenographic Minutes:

1. As to Kadane's dual employment, the plaintiffs are in possession of an official certification by the SEC, as follows:

> "Mr. David K. Kadane was employed on the staff of this Commission from April 5, 1938 to December 4, 1946."

This certification is signed by the Director of Personnel.

2. As to the Plaintiff Nichols' status as a stockholder:

Mr. Nichols, as the Company's record shows, received Dividend check #26963, dated November 1, 1956, from the Long Island Lighting Company.

3. As to the verification of the complaint, the complaint was verified by Ennis M. Nichols on the 1st day of December, 1954, before John F. A. Becker, Notary Public, at his office on the 6th floor of the Colorado Building, in the City of Washington, D. C. Through oversight or intent the complaint as filed by the then attorneys of record was not verified. Living witnesses are available and at the Court's order to prove this. The defendants' position as to the verification is captious and untenable. Defendants' counsel have repeatedly contended in this Court and the District Court that the complaint now here was identic with that served and filed in the action against the Long Island Lighting Company and upon this ground succeeded in having the instant complaint dismissed under the rule of *res judicata* and the plaintiffs' then attorneys held in contempt by the District Court for the filing thereof. There is no question that the complaint against the Long Island Lighting Company was verified. There is no question that, in fact, the complaint now here was verified. When it serves their purpose, apparently defendants'

counsel do not agree that things equal to the same thing are equal to each other. Moreover, since the defendants have not answered or been ordered to answer either complaint, the whole contention as to verification is too trivial for discussion.

4. As to the statement that the plaintiffs had, before the SEC, adduced evidence, cross-examined witnesses, filed briefs and made oral argument. We ask, in reply, that defendants' counsel point to the record as to the statements that the plaintiffs had "adduced" evidence.

5. As to the testimony of Charles Elbert, there is on file in the District Court in Civil Action 10413, an affidavit made by Mr. Elbert on December 5, 1952, seeking the same injunction which Judge Abruzzo granted and in this Court a 14 page printed affidavit of the same Elbert.

6. As to the position of David K. Kadane, as attorney and counsel for the Long Island Lighting Company since 1948, and as Special Counsel for the SEC in the reorganization proceedings in 1944, we quote the following from the record on the fee hearings in which Milton Pollock, Esq., in attempting to sustain his claim of $350,000 for services rendered in "inventing" the means of taking the Long Island Lighting Company organization into the SEC and away from the Public Service Commission of New York:

> "One of the things that made the services ultimately possible was the continuing pressure against the Company War Chest and the Company's activities; proceedings which at the time, I think you were familiar with *as a member of the staff of the SEC.*"

This testimony referred to events occurring in the year 1943. (See also names of counsel appearing for SEC before this Court in 148 Fed. 2d 252.)

As to the contention raised by defendants' counsel that plaintiffs' motion to take testimony should have been

entitled in the reorganization proceeding (No. 10143), we reply as follows:

(1) The June 7th opinion of this Court was entitled in *Nichols* v. *Alker* on a motion similarly entitled.

(2) The order appealed from recites and relies on no such defect in procedure nor was it raised on oral argument.

(3) Prior to preparation of plaintiffs' motion papers, plaintiffs' counsel endeavored to confer with Chief Judge Inch as the course of action to be followed in the District Court but was given no advice other than through his secretary to follow the decision of the Court of Appeals.

(4) When the attempt was made to file the motion papers in the office of the Clerk of the District Court, they were rejected and it was not until the Clerk of this Court furnished plaintiffs' counsel with a certified copy of this Court's opinion of June 7th and of the order entered thereon that the Clerk of the District Court accepted the motion papers. At the time of this filing, Civil Action No. 10143 was closed and had been closed for years and nothing could be filed there in counsel's opinion without a prior order of this Court reopening it, despite the complete disregard of such practice in defendants' motion for injunction, here on appeal.

(5) Since the decision of this Court in 1952, denying plaintiffs' motion to set aside its affirmance of the enforcement order, these plaintiffs have never questioned the finality of the enforcement order and have repeatedly in prior briefs filed in this Court asserted their recognition of it as unchangeable as the laws of the Medes and the Persians.

(6) It was and remains inconceivable to plaintiffs' counsel that in its decision of June 7, 1956, if newly discovered evidence to be presented by the plaintiffs proved the fraud and conspiracy alleged, this Court contemplated or would consider reversing its 1952 decision and reopening a reorganization proceedings in which the enforcement order was signed over six years, since when tens of million of dollars in new securities of the reorganized company have been bought by the American public in reliance thereon with the full sanction and approval of the Securities and Exchange Commission and listed on the New York Stock Exchange. Plaintiffs' counsel, in framing the complaint and in the conduct of the proceedings now here, has strictly and studiously avoided doing any act or thing which could directly or indirectly affect the asset or market value of those securities. To advocate any motion such as defendants' counsel now insists should have been made shows a complete callousness toward the security holders of their own Company and suggests a course of action which the plaintiffs would be compelled to follow, if the contention of defendants were to be sustained.

Analysis of Orders Appealed From

The orders as signed and served appears to contain the interlineation by Judge Abruzzo of the following words, after reciting the papers on which the motion was granted:

> "The transcript of minutes indicates clearly there is no new and additional evidence of fraud * * *."

As this transcript shows, Judge Abruzzo ruled: "I am making the ruling that you must submit evidence of fraud to me, that you have discovered *since* the Court of Appeals passed upon this matter in February or June, or evidence

of fraud that you, in February or June of this year, were not able to discover and have discovered since."

This Court's last opinion used this language "*substantial evidence of fraud was not obtained by due diligence in time to present it either in the original reorganization proceedings or in the subsequent petition filed in 1952.*"

In Civil Action #14890, wherein plaintiffs had moved on July 18, 1956, that the District Court proceed to a trial of the issues of fraud and conspiracy, "as set forth in the complaint herein, as mandated by the annexed opinion of the United States Court of Appeals for the Second Circuit on June 7, 1956", Judge Abruzzo in the District Court, having refused to admit any evidence of newly discovered evidence prior to June 7, 1956, ordered as follows:

> "It appearing that the said complaint has been dismissed and stricken as sham, and that the Court of Appeals has affirmed said dismissal and that the Supreme Court of the United States has denied a petition by plaintiffs for a writ of certiorari to review said dismissal, now, therefore,
>
> "IT IS ORDERED, that the said motion be and hereby is, in all respects, denied."

It is unnecessary to point out that the action of the United States Supreme Court has no bearing on this motion, first, because the action of this Court on June 7th had deprived the Supreme Court of any jurisdiction to receive a petition for certiorari and further for the general reason, recently reiterated by Mr. Justice Frankfurter in the *Shepard* case (*supra*), a denial of a writ of certiorari in no way implies any opinion by the Supreme Court that a particular cause has been justly or properly decided.

It is further to be pointed out that the statement in the order of Judge Abruzzo that this Court affirmed the dismissal of the complaint upon the ground that it was sham

finds no support in the language of this Court's lengthy opinion of February 14, 1956.

In Civil Action No. 10413 which is the proceeding by SEC to procure an enforcement order, the Order here appealed from prefaces its granting a permanent injunction against the plaintiff Nichols and his counsel Aron, by the following language of the Order:

> "* * * and the Committee and Ennis M. Nichols having moved in this Court upon the identical matter previously shown to the Court of Appeals for an order requiring said defendants in Nichols, et al. v. Alker, et al., to answer the complaint therein and proceed to trial and said motion having been denied (order dated October 25, 1956)." This is a day previous to the date of the order here appealed from.

We point out the unique use of the word "shown" in the order appealed from and the fact that the District Court has never had before it "the identical matter" set forth in the motion appealed from and that neither in this Court nor in any other court or tribunal or administrative body has any evidence been received of the facts affirmed under oath on this motion denied below and here and now appealed from.

SUMMATION

POINT I

The District Court in its order in Civil Action 10413 has aided and abetted the defendants in Civil Action 14890 in evading the decision of this Court on June 7, 1956.

POINT II

The District Court in its order dismissing Civil Action 14890 has violated and overruled the decision and order of this Court on June 7, 1956.

We are constrained to repeat the following question, asked in our brief before this Court in Number 56, on defendants' motion to dismiss the action against Long Island Lighting Company supported by the Securities and Exchange Commission:

> "In simple mental honesty, realism and good conscience, we ask this question in conclusion: If the charges of the complaint that 11,000 stockholders were by conspiracy participated in by LILCO defrauded out of $27,500,000 are frivolous, as characterized in the last sentence of appellee's brief, why should not the Company and its management accused of thus conniving be the first to welcome a jury trial before a Federal judge in their own district?"

In addition to the foregoing WHY, we are constrained to ask WHERE at any stage of the administrative and court proceedings during the past twelve years, these plaintiffs have at any time or place been afforded any opportunity to present any evidence of the undenied allegations of the complaint?

Again, we are constrained to ask WHEN and by what authority the principle stated by Mr. Justice Roberts as umpire of the Mixed Claims Division, United States and Germany, ceased to be good law? Appendix of Opinions, page 1127.

> "The petition, in short, avers the Commission has been misled by fraud and collusion on the part of the witnesses and suppression of evidence on the part of some of them. The Commission is not *functus officio*. It still sits as a court. To it in that capacity are brought charges that it has been defrauded and misled by perjury, collusion and suppression. No tribunal worthy of its name may allow a decision to stand if such allegations are well founded. Every tribunal has inherent power to reopen and revise a decision induced by fraud. It may correct its own errors and mistakes."

When, again, we ask, were the precepts stated by the United States Supreme Court in *Alabama Public Service Commission* v. *Southern Railway Company*, 341 U. S. 341, abrogated.

With reference to such authority, this Court will recall that in its first decision (1944) as to the reorganization of the Long Island Lighting Company, this Court found, in the opinion of Judge Swan (148 F. 2d 252), the Long Island Lighting Company, as a purely intra-state company, had been legally and completely reorganized under the laws of the State of New York, by its Public Service Commission and with full consent of its stockholders, even to the point of trading having ceased on the stock exchanges of the securities and shares of the original company. It was at this juncture that certain of these defendants conspired, in their own words, to "invent" a scheme by which SEC would oust the State of New York and its Public Service Commission of jurisdiction. It is difficult to conceive a more carefully premeditated violation of the rules and

standards laid down by the United States Supreme Court in the *Alabama* decision.

Finally, we are constrained to ask by what legerdemain these defendants and their predeeessors have never during five years been examined despite the efforts to do so and the provisions of the FRCP or called upon to answer the verified complaints of these plaintiffs in this action and in the action against Long Island Lighting Company, the first of which was filed and served in November 1952.

In the proceedings listed below, if the Court will review in its own records, earlier briefs and appendices and its own prior opinions, there will be revealed the fraud practiced on this Court and attempted elsewhere.

1. On the appeal from the Enforcement Order.

2. On petition for rehearing after denial thereof.

3. On petition to review affirmance of Enforcement Order.

4. On petition for rehearing after denial thereof.

5. On appeal in action by these plaintiffs against Long Island Lighting Company and Securities and Exchange Commission.

6. On petition for rehearing on affirmance thereof.

7. On appeal in pending action between present plaintiffs and defendants.

8. On petition for rehearing on affirmance thereof.

9. On petition to take testimony of after-discovered evidence.

From our reply brief in the United States Supreme Court, we quote as follows:

> "No more flagrant untruth has been written in the artful and deceitful defense of this litigation

than the statement at page 5 of appellees' brief that 'petitioners' claims have repeatedly been examined, and found wanting.' The mendacity of such a statement in this high tribunal is answered by a single word 'WHERE?'

That this gross deception is not unintended, on the following page of appellees' brief (p. 6), we find it repeated:

> 'Moreover, in the case at bar petitioner has already raised his issues in the reorganization proceedings and lost on the merits.'

There is not a scintilla of evidence or support for this statement in the entire record of the reorganization proceeding.

Again, on the following page (7) the same deception is again attempted, commenting on *Stoll* v. *Gottlieb,* appellees' counsel state:

> 'Here it has also been held that the charges of fraud are groundless'."

Since the facts were first revealed *after the close of the proceedings before SEC and after the Enforcement Order and its affirmance by this Court,* these plaintiffs have consistently charged and tendered indisputable and documented proof thereof *that SEC, the district court and this Court were conspiratorially victimized by these defendants or some of them throughout the past twelve years as to depreciation reserves and earnings of the Long Island Lighting Company.*

In its opinion of June 1, 1950, this Court, *inter alia,* said:

> "Considering that the state Commission had tentatively found a deficiency of $10,263,969 in the reserves for depreciation and that no one had proved the figure wrong, we see no impropriety in the Com-

> mission's acceptance of this figure without further independent inquiry in arriving at a rate base and rate of return for use in checking the accuracy of its estimate of future net income."

On October 20, 1950, Long Island Lighting Company petitions New York Public Service Commission for reduction of its depreciation reserve, alleging it to be excessive by more than $3,100,000, based upon report of Engineer Maurice Scharff, supported by legal opinion from Messrs. Blakeslee and Kadane, that in the circumstances of this case, there was grave doubt that the New York Public Service Commission had jurisdiction to impose the alleged deficiency in depreciation reserve.

On July 3, 1951. At public hearing before the New York Public Service Commission (p. 2046, stenographic transcript), Mr. Kadane, then speaking as counsel for the Long Island Lighting Company, stated that

> "The Company has been working on this matter for its depreciation reserve and depreciation accruals for substantially *more than a year,* and has engaged the service during that period of an independent engineer and has had the benefit of reports by that engineer."

On September 4, 1951. New York Public Service Commission determines that former alleged deficiency in depreciation is excessive by amount of *$3,219,453.31.*

The original petition under 11(e) of the PUHCA was filed by these defendants or some of them, owning less than 1% of the Company's stock on April 25, 1945, while defendants' present counsel Kadane was a salaried employee of the legal staff of the SEC. The petition was amended June 16, 1948, after Kadane became General Attorney of the Long Island Lighting Company and after these plaintiffs had been permitted a "limited participation" by SEC.

The chief amendment was to provide for the common stockholders, for whom no provision was made, under the plan as originally filed, of $1,050,000 for the more than 49% which they owned of the common stock of the Company, as reorganized by the Public Service Commission of New York and now worth between fifty and one hundred million dollars.

If such a review of the prior briefs and appendices and opinions, which is apparently the *sine qua non* of justice being done, is too great a burden on this Court, counsel will take upon himself the responsibility of meeting the expense of the appointment of and hearings before a Special Master designated by this Court, provided plaintiffs' counsel is relieved of the injunction granted against him personally in the order here appealed from and from the injunction obtained against these plaintiffs at their first advent in 1948, in the proceedings before SEC, on behalf of these defendants denying the plaintiffs the right to solicit from their own number any financial assistance in prosecuting their cause and protecting their constitutional rights.

The defendants, since the denial by SEC of the Committee's right to solicit funds from stockholders whose written proxies and powers of attorney it held, have branded the plaintiffs as the "tin cup committee" and such it has been and continues to be; however, a contribution of *one cent* a share on the stock for which it has acted will adequately cover the cost of proceeding before a Special Master and hearings may be conditioned on such amount as this Court may fix being deposited with the Clerk of the Court (*Halstead* v. *S.E.C.* (divided court), 182 Fed. 2d 660).

The poverty of the Committee appellant has fallen heavily on its counsel and undoubtedly impaired his effectiveness, as the result of the action of SEC and this Court in reducing his claimed fee in the reorganization proceed-

ing, from $150,000 to $7,500, as the result of the opinion of this Court in 211 Fed. 2d 412, where Judge Learned Hand in March 1954 reviewed the activities and services of the Committee's counsel and the fact that "he has always challenged the jurisdiction of the S.E.C. on the ground that the 'Old Company' was purely intrastate, and on the ground that the shareholders had acquired vested rights under the original plan of 1944 * * * down to the present time he has consistently urged that the common stockholders had been, and continued to be, defrauded by the management of the 'Old Company'." Judge Hand's opinion and the decision of this Court, however, contain the following remarkable conclusion:

> "In the case at bar all claims are limited to services rendered after June 1948, when the Committee was allowed to intervene; by that time we had decided that the S.E.C. was paramount, and the Supreme Court had refused to intervene. We may of course have been mistaken: but it should have appeared to Mr. Aron to the last degree unlikely that our ruling would not have remained authoritative. We can not, therefore, accept as compensable any efforts directed towards the possibility that the case would not have to be worked out in the pending proceeding."

If a competent Master is thus appointed by this Court to hear and report to it whether or not

THIS COURT HAS BEEN DEFRAUDED
THE SEC WAS DEFRAUDED
11,000 COMMON STOCKHOLDERS WERE DEFRAUDED

thereupon, these plaintiffs will waive the right to and demand for a jury trial.

This Court has conceded in earlier opinions in this matter that proof of the plaintiffs' allegations of fraud

and conspiracy would empower it, and place upon it, the duty to rectify the consequences of its initial decisions. *Nichols* v. *Long Island Lighting Company* (opinions by A. N. Hand), 207 Fed. 2d 931—1953 and 211 Fed. 2d 393—1954.

From the outset of this and antecedent litigation, all that these plaintiffs have sought and are seeking, is a chance to be heard. A motion to dismiss and for summary judgment was denied by Chief Judge Inch in the action against the LILCO which defendants' counsel contended is identic in its allegations with the complaint now here and on that basis induced Judge Galston to dismiss as sham the present complaint, against the directors of LILCO. Certainly, the plaintiffs have not slept on their rights and no laches or estoppel bars them from the common law jury trial they have demanded as a matter of constitutional right and yet today without ever having had the opportunity to offer their evidence and proof they are forever barred from every court in the country.

CONCLUSION

The orders appealed from must, in any event, for reasons heretofore set forth, be reversed and the action (14890) forthwith ordered to trial on the merits in any manner or forum agreeable to this Court.

Respectfully submitted,

HAROLD G. ARON,
Attorney for Appellants.

March 1, 1957.

ATTACHMENTS

Annexed hereto marked A are copies of a letter written to Mr. George S. Munson of Philadelphia by Duff and Phelps of Chicago dated October 16, 1942, enclosing a copy of an opinion of Shearman & Sterling dated October 5, 1942 which to a degree dates the beginning of the conspiracy alleged in the complaint but, although both Mr. Munson and Duff and Phelps are designated in our motion papers as witnesses to be examined, neither one of them nor, of course, Shearman & Sterling are named as defendants herein nor is it alleged that any of them was a party to the fraud and conspiracy charged in the complaint.

Also annexed hereto, marked B, are extracts from the Printed Recommendation of David K. Kadane, as attorney for Long Island Lighting Company, dated June 8, 1951, opposing the fee application of Milton Pollack.

Also annexed, marked C, is a communication from the Securities and Exchange Commission and extracts from its employment regulations, marked C-1.

Also annexed, marked D, is a letter to the late Col. Charles G. Blakeslee, dated August 8, 1949, written by associate counsel for the plaintiffs, having to do with efforts of the plaintiffs to reassert their control of the Long Island Lighting Company from which they had been barred for six years by the management failure and refusal to hold a stockholders meeting.

Also annexed hereto, marked E, is Case Comment on this litigation from the most recent issue of the Harvard Law Review.

(p 26 is blank)

Attachment A

(Munson Exhibit #1 before Securities and Exchange Commission, April 18th, 1951. The Exhibit includes a 3 page single spaced memorandum of Shearman & Sterling, dated October 5, 1942, bearing the initials SAR/nba.)

DUFF AND PHELPS.
208 South LaSalle Street
Chicago

October 16, 1942

Mr. George S. Munson
Townsend, Elliott & Munson
Provident Trust Building
17th and Chestnut Streets
Philadelphia, Pa.

Dear George:

Herewith find the memorandum on the Long Island Lighting Company matter, which I did not get to drop off at your office as the Securities and Exchange Commission held me much longer than I anticipated. This is a memorandum prepared in the office of Shearman & Sterling in New York and looks like it makes recapitalization rather difficult unless the Securities and Exchange Commission has some authority to step into a matter of this kind.

Yours very truly,

DUFF AND PHELPS
By W. H. DUFF

whd n

Attachment B

(Extracts from Recommendation filed June 8, 1952, with Securities and Exchange Commission by David K. Kadane, General Counsel, Long Island Lighting Company.)

"Pollack expressed as the 'vital aspect' of their services the organization of the preferred stockholders, the 'arousing' of the New York Commission, the negotiations with the Company, the creation of an atmosphere of pressure which forced the company to make a move towards a plan, and the 'invention' of grounds of interstate commerce which would support the Commission's jurisdiction (S.M. 79-80). The efforts to organize the preferred stockholders met with the light response of 5% (S.M. 82), compared with the 'Langley' Committee's representation of over 50% of the same class of stock (S.M. 375). Pollack's explanation of the benefit conferred by 'arousing' the New York Commission is that they generated the interest of the Chairman in the possibility of federal reorganization which generated the search for a basis of federal jurisdiction (S.M. 83). The fact is that the New York Commission approved the 1944 plan which counsel had opposed before them (S.M. 84, 85). An attempt is also made to illustrate benefit flowing from conversations with the Company and such 'pressure' as they allege to have manufactured. The benefit claimed is the filing of the 1944 plan by the Company (S.M. 85-92), th very plan they opposed.

The last 'vital' item enumerated was the 'invention' of grounds of interstate commerce, the facts of which were alluded to previously. It has been admitted that Granger, who practiced law for two years, thirty years ago (S.M. 153), suggested the legal solution which put their research on the proper path.

Counsel did only two things worthy of note in this proceeding: the writing of the letter to the SEC in February, 1944, and the subsequent filing of the revocation petition. Their arrival at the stupendous fee of $350,000.00

for these services was based on the assumption that they were the first to seek relief from this Commission, and their own notion of the importance of that fact (S.M. 94-95). However, Munson, another applicant in this proceeding, wrote a letter to the Commission on March 1, 1943, requesting an investigation into the Long Island System (Munson Pet., Ex. 'A') and was retained for the specific purpose of securing Commission jurisdiction over Long Island (S.M. 336, 344-345). Pollack's cross-examination of Jackson at the fee hearings developed the fact that Jackson had advised Munson's client, Duff, as early as 1941 to attempt to get Long Island under the Commission's jurisdiction because sufficient grounds existed to justify the revocation of the exemption (S.M. 313-320)."

Attachment C

(Communication received from Securities and Exchange Commission, dated July 25, 1951.)

Securities and Exchange Commission
July 25, 1951

Mr. David K. Kadane was employed on the staff of this Commission from April 5, 1938 to December 4, 1946. Inquiry among his former associates has made available his present location and association as

Long Island Lighting Company
Mineola, Long Island, New York.

7-25-51

WILLIAM E. BECKER
Director of Personnel

Attachment C-1

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C.

February 4, 1953

ADOPTION OF REGULATION REGARDING CONDUCT OF MEMBERS AND EMPLOYEES AND FORMER MEMBERS AND EMPLOYEES OF THE COMMISSION

Purpose

The Securities and Exchange Commission is adopting a comprehensive regulation to restate the ethical principles which it believes should govern and *have governed* the conduct of members and employees and former members and employees of the Commission.

• • •

Paragraph (a) of Rule 6 prohibits *without limit of time* former members and employees from appearing before the Commission in a "particular matter" with respect to which they had a prior official responsibility or specific knowledge. This rule is intended to be declaratory of the practice which the Commission has applied in the advisory rulings that have been rendered from time to time in the past concerning the propriety of specific appearances by former members and employees.

• • •

Attachment C-1

Text of Regulation

The text of the regulation is as follows:

REGULATION REGARDING CONDUCT OF MEMBERS AND EMPLOYEES AND FORMER MEMBERS AND EMPLOYEES OF THE COMMISSION

Rule 1. *General Statement of policy.*

It is deemed contrary to Commission policy for a member or employee of the Commission to—

(a) engage, directly or indirectly, in any personal business transaction or private arrangement for personal profit which accrues from or is based upon his official position or authority or upon confidential information which he gains by reason of such position or authority;

(b) accept, directly or indirectly, any valuable gift, favor, or service from any person with whom he transacts business on behalf of the United States;

(c) discuss or entertain proposals for future employment by any person outside the Government with whom he is transacting business on behalf of the United States;

(d) divulge confidential commercial or economic information to any unauthorized person, or release any such information in advance of authorization for its release;

(e) become unduly involved, through frequent or expensive social engagements or otherwise, with any person outside the Government with whom he transacts business on behalf of the United States; or,

(f) act in any official matter with respect to which there exists a personal interest incompatible with an unbiased exercise of official judgment.

• • •

Rule 5. *Negotiation for private employment.*

(a) The provisions of Rule 1 (c) are deemed to preclude negotiation for private employment by an employee who is immediately engaged in representing the Commission in any matter in which the prospective employer is opposing counsel or person chiefly affected. With the approval of his superior or the Commission an employee may be relieved of any assignment which, in the absence of such relief, might preclude such negotiation.

• • •

Rule 8. *Violation and participation in violation of Rules.*

Knowing participation in a violation of this regulation by persons not within the scope of the foregoing rules shall likewise be deemed improper conduct and in contravention of Commission rules. Departure from any of these rules without specific approval may be cause for removal or for disqualification from appearing and practicing before the Commission.

• • •

Attachment D

Lynne A. Warren
Charles B. McGroddy, Jr.

Telephone
WHitehall 3-9194

Law Offices
WARREN AND McGRODDY
39 Broadway
New York 6, N. Y.

Col. Charles G. Blakeslee
250 Old Country Road
Mineola, New York

Re: Long Island Lighting Company

Dear Colonel Blakeslee:

As you undoubtedly know, an advertisement has been published in the New York Times and Wall Street Journal calling a stockholders meeting of Long Island Lighting Company for the election of directors on September 15, 1949, at the office of the Company in Mineola.

The Common Stockholders Committee is taking the position that because the 1944 recapitalization became effective upon the filing of the Company's certificate of amendment, holders of both series of the Preferred Stock of the Company will be entitled to vote at this meeting, notwithstanding the fact that by reason of certain stay orders and the acquiescence of the Company, no certificates for the new Common Stock have ever been issued, either to the Preferred Stockholders or to the holders of the old Common Stock.

We are preparing solicitation material which will be filed with the Securities and Exchange Commission very shortly and upon approval it will be necessary for us to solicit the proxies of all those entitled to be Common Stockholders of the Company. This will require preparation of current stockholders lists, both Common and Preferred, which we will call upon you to supply us with in the near

future. We are writing now so that the Company will be able to supply such lists promptly and thus not delay such solicitation.

On March 3, 1948 at the hearing before the Public Service Commission, Mr. Miles testified that the directors and officers of the Company held Common Stock of record or beneficially as follows:

* Alker	100	Shares
* Barrett	17,510	"
* Blakeslee	10	"
* Carpenter	400	"
* Coe	—0—	"
* Doebler	500	"
* Link, Jr.	200	"
Gramley	3,005	"
* Olmsted	—0—	"
Booth	400	"
* Crummie	50	"
* Miles	9	"
Wakeman	—0	"
Merwin	12	"

Will you kindly advise us whether there has been any change in these holdings to date and if so, the amount of the change. We desire this information for inclusion with our proxy material.

Very truly yours,

CBMcG/has
cc: Harold G. Aron, Esq.

(* Named as defendants herein and who constituted the Management which schemed and "sparked" the fraudulent reorganization before SEC.

It will be observed that the Long Island Lighting Company at this date had 3,000,000 shares issued and outstanding, of which plaintiff-appellant committee holds proxies and written authorizations for over 25%.)

Attachment E

(From 70 Harvard Law Review, 562, *et seq.*, January 1957)

JUDGMENTS—COLLATERAL ATTACK: IN GENERAL—COURT DECREE ENFORCING CORPORATE REORGANIZATION PRECLUDES INDEPENDENT ACTION AGAINST CORPORATE OFFICIALS FOR FRAUD IN REORGANIZATION.—During proceedings before the Securities and Exchange Commission to reorganize a corporation under § 11(e) of the Public Utility Holding Company Act of 1935, 49 Stat. 822, 15 U. S. C. § 79k(e) (1952), representatives of the common stockholders disputed statements by officers and counsel of the corporation concerning corporate earnings and depreciation and affecting the stockholders' proportionate share in the reorganized corporation. The Commission approved a plan unfavorable to the common stockholders; application to a district court for enforcement was granted. *In re Long Island Lighting Co.*, 89 F. Supp. 513 (E. D. N. Y.), *aff'd sub nom. Common Stockholders Comm.* v. *SEC*, 183 F. 2d 45 (2d Cir.), *cert. denied*, 340 U. S. 834 (1950). Under § 18(f) of the act, 49 Stat. 832 (1935), 15 U. S. C. § 79r(f) (1952), the district court enjoined any interference with the decree enforcing the plan. A motion by a representative of the common stockholders to reopen the proceedings was denied by the court of appeals because the allegations did not show that fraud had been practiced upon the Commission. *In re Long Island Lighting Co.*, 197 F. 2d 709 (2d Cir. 1952). Dismissal of a later tort action against the reorganized company based upon similar allegations of fraud was affirmed on appeal on the grounds that the action was a collateral attack upon the reorganization decree and that the facts alleged were res judicata. *Nichols* v. *Long Island Lighting Co.*, 207 F. 2d 931 (2d Cir. 1953), *modified on rehearing*, 211 F. 2d 392, *cert. denied*, 348 U. S. 827 (1954). The present action was then brought against officers and other agents of the corporation, members of a preferred stockholders' committee,

and a former attorney for the SEC to recover damages suffered by the common stockholders under the plan as a result of an alleged conspiracy to defraud them of their interest. On appeal from dismissal of the complaint on grounds of res judicata, *held*, affirmed. The enforcing court took exclusive jurisdiction over the reorganization plan under § 11(e); the decree therefore is beyond collateral attack under the guise of an action in tort. *Nichols* v. *Alker*, 231 F. 2d 68 (2d Cir.), *cert. denied*, 352 U. S. 829 (1956).

The court used the term "collateral attack" in dismissing an action which did not seek to set aside a prior judgment but which predicated damages upon the invalidity of that judgment. Such an action between parties bound by the prior judgment is ordinarily forbidden as an attempt to redetermine issues already decided. See, e.g., *Watts* v. *Alexander, Morrison & Co.*, 34 F. 2d 66 (E. D. N. Y. 1929). *aff'd sub nom. Watts* v. *Vanderbilt*, 45 F. 2d 968 (2d Cir. 1930) (alternative holding). But cf. *Griffith* v. *Bank of New York*, 147 F. 2d 899 (2d Cir.), *cert. denied*, 325 U. S. 874 (1945). The Court, however, did not mention the traditional grounds forbidding collateral attack but emphasized the exclusive jurisdiction of the enforcing court and the existence of the injunction against interference with its decree. An analogy was made to the similar exclusive jurisdiction and injunctive powers granted to a bankruptcy court conducting a corporate reorganization under Chapter X of the Bankruptcy Act. 52 Stat. 883 (1938), as amended, 11 U. S. C. §§ 501-676 (1952); see *Evans* v. *Dearborn Mach. Movers Co.*, 200 F. 2d 125 (6th Cir. 1952); *Mar-Tex Realization Corp* v. *Wolfson*, 145 F. 2d 360 (2d Cir. 1944). The emphasis on these factors seems misplaced in view of the fact that the exclusive jurisdiction of the enforcing court is over the plan itself and § 18(f), authorizing the injunction, refers only to violations of the terms of the plan. Since a tort action for money damages from individuals would not affect the corporate reorganization, it would seem that such

an action does not infringe upon the court's exclusive jurisdiction or violate the injunction. This ground for decision, therefore, seems to rest on the assumption that the exclusive jurisdiction of the enforcing court, in order to be effective, must extend to any action in which its conclusions or those of the SEC are called into question. Such an assumption does not seem necessary for the effective administration of the PUHCA, and therefore would appear to be an unnecessary limitation on the well-recognized power of courts of general jurisdiction to hear actions for fraud. Where a stockholder who was not present at reorganization proceedings under the PUHCA attempted to set aside the injunction against interference so that he could sue the corporate officers for fraud, the First Circuit did not consider the exclusive-jurisdiction question in implying that the injunction would not prevent him from maintaining a tort action. *Petition of Blatchley,* 157 F. 2d 894, 898 (1st Cir. 1946) (dictum).

The present court, by referring to the special competence of the SEC to decide the issues of fraud and the measure of damages, raised the question of primary jurisdiction. See *Far East Conference* v. *United States,* 342 U. S. 570, 574 (1952). A court hearing this tort action would have to determine the truth of statements concerning corporate earnings and depreciation and ascertain the damages suffered if the statements were found false. These problems fall within the special competence of the SEC and would be familiar to the agency as a result of the corporate reorganization. The practical advantages of allowing only the SEC to hear the fraud allegations would therefore be considerable. However, after the reorganization plan has been adopted and put into effect, it is probably too late for the administrative agency to remedy the defects caused by the fraud. Consequently, it seems that at this late stage the doctrine of primary jurisdiction should not preclude one from bringing an independent tort action.

Since the reasoning of this decision would apply even if the plaintiffs had not been barred by the doctrine of collateral estoppel, the court avoided any mention of this doctrine as a basis for decision, although a concurring judge would accept only this theory. The defendants' statements, the veracity of which was at issue in the instant case, had necessarily been found true in the reorganization proceedings, where the present defendants controlled the opposition to the present plaintiff; therefore, collateral estoppel would have offered a firm basis for dismissing the complaint. See, e.g., *Carson Inv. Co.* v. *Anaconda Copper Mining Co.*, 26 F. 2d 651, 657 (9th Cir.), *cert. denied*, 278 U. S. 635 (1928).

Note: As to the *Blatchley* Case, 157 Fed. 2, 894, above referred to, cited in our earlier briefs, see this Court's comment in the footnote on page 733 in its opinion on our earlier appeal.

Nichols v. *Alker*, 231 Fed. 2d 68, February 14, 1956.

APPENDIX

Extract from Docket Entries in Action No. 10413

(Record pages A to D)

• • •

Date *Proceeding*

7-13-56—Notice of Motion filed for Supp. Order to enjoin Ennis M. Nichols, etc. 7/18/56.

7-18-56—Before Abruzzo, J.—Motion for Supp. Order to enjoin Ennis M. Nichols, etc. submitted. All papers 8/1/56.

10-15-56—By Abruzzo, J.—Notice of hearing for 10/22/56, 10:30 A. M. filed (notices mailed out).

10-22-56—Before Abruzzo, J.—Hearing on motion to enjoin etc. Approved and granted as indicated. Settle order on notice.

• • •

10-23-56—Transcript of record filed (hearing of 10/22/56.)

10-26-56—By Abruzzo, J.—Supp. Order filed granting motion as indicated, enjoining Ennis M. Nichols, et al. from taking further proceedings, ets.

11-16-56—Notice of appeal filed. Copy of instructions handed to atty.

11-16-56—Bond on appeal filed.

12-18-56—By Abruzzo, J.—Order filed extending time to file Record on Appeal to 2/14/57.

1-31-57—Stipulation as to contents of Record on Appeal filed.

Notice of Motion in Action No. 10413 for Supplemental Injunction Order

(Record pages 3-4)

Sir:

PLEASE TAKE NOTICE that on the affidavit of Bertram D. Moll dated July 12, 1956 and the exhibits thereto the undersigned will move this Court at a motion part thereof on the 18th day of July, 1956, at 10:30 A. M., or as soon thereafter as counsel can be heard, in the United States Court House for the Eastern District of New York, 271 Washington Street, Brooklyn, New York, for an order, supplemental to the order dated February 17, 1950 made herein, specifically enjoining Ennis M. Nichols, the Common Stockholders Committee and Harold G. Aron from taking further proceedings based on the allegations of their complaints in *Nichols* v. *Long Island Lighting Co.* (E. D. N. Y. No. 13054) and *Nichols* v. *Alker* (E. D. N. Y. No. 14890) against Long Island Lighting Company and certain individuals who are more fully described in said affidavit.

Dated: Mineola, New York,
July 12, 1956.

Yours, etc.,

DAVID K. KADANE,
Attorney for Long Island Lighting Co., and Barrett, Fraser, Hausman, Blakeslee, Carpenter, Coe, Doebler, Link, Olmsted, Crummey, Hagerty, Booth, Tegen, Koons, Miles, Langley, Elbert and Pro Se.,
250 Old Country Road,
Mineola, New York.

Notice of Motion in Action No. 10413 for Supplemental Injunction Order

WINTHROP, STIMSON, PUTNAM and ROBERTS,
Attorneys for Marks,
40 Wall Street,
New York, New York.

CHARLES C. LOCKWOOD,
Attorney for Vanneck,
30 Pine Street,
New York, New York.

PERCIVAL E. JACKSON,
Pro Se.,
68 William Street,
New York, New York.

To:

HAROLD G. ARON, Esq.,
Attorney for Ennis M. Nichols,
Common Stockholder Committee,
and Pro Se.,

c/o GUTHRIE and COMPANY,
37 Wall Street,
New York, N. Y.

Affidavit of Bertram D. Moll, Read in Support of Foregoing Motion

(Record pages 5-13)

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

BERTRAM D. MOLL, being duly sworn, says:

1. I am an attorney associated with David K. Kadane, attorney for Long Island Lighting Company and for eighteen of the persons named as defendants in an action entitled *Nichols* v. *Alker* (E. D. N. Y. No. 14890) which has been dismissed as *res judicata* and stricken as sham 126 F. Supp. 679 (Judge Galston), *aff'd.*, 231 F. 2d 68, *petition for certiorari pending,* and which action is more fully described hereinafter. I am fully familiar with the facts set out in this affidavit submitted in support of a motion by the Company and the said eighteen persons, and by John Vanneck (represented by Charles C. Lockwood, Esq.), by Laurence M. Marks (represented by Winthrop, Stimson, Putnam and Roberts, Esqs.) and by Percival E. Jackson, Esq., *pro se* for an injunction order supplemental to the order dated February 17, 1950 made herein, to enjoin Enis M. Nichols and the Common Stockholders Committee of Long Island Lighting Company, and their counsel, Harold G. Aron, from the institution of any further proceedings based on the allegations of their complaints in *Nicholas* v. *Alker, supra,* and *Nichols* v. *Long Island Lighting Co.*, 207 F. 2d 931; 211 F. 2d 392, *cert. denied* 348 U. S. 827, *rehearing denied,* 348 U. S. 884. These complaints allege that said individual moving parties participated directly or indirectly, in the above-captioned reorganization proceedings. The relief requested hereby was suggested by the Court of Appeals as a means of stopping further proceedings based on those complaints, 231 F. 2d at

pp. 79, 80, and is made necessary by steps taken by Messrs. Nichols and Aron in this Court, purportedly in *Nichols* v. *Alker,* subsequent to that decision.

2. The instant proceedings were for the enforcement of a plan of reorganization of Long Island Lighting Company under the provisions of the Public Utility Holding Company Act of 1935. Enforcement was granted, 89 F. Supp. 513 (Judge Kennedy), *aff'd. sub nom. Common Stockholders Committee* v. *S. E. C.*, 183 F. 2d 45, *cert. denied,* 340 U. S. 834, over opposition by Mr. Nichols and his Common Stoekholders Committee, represented by Mr. Aron, who unsuccessfully charged that the S. E. C. lacked jurisdiction over the reorganization; that the Company's prospective earnings had been understated; that accrued depreciation had been overstated; that the Common Stockholders had been oppressed by being denied the right to hold a meeting or to solicit funds; and by having been granted only a "limited participation in the proceedings;" and that an offer to sell the Company securities to Consolidated Edison Company of New York at an inadequate price had been considered.

Mr. Nichols and his group further charged that the reorganization was a "scheme" foisted upon the common stockholders by a "management cabal" and illustrates the truth of the adage "What a tangled web we weave when first we practice to deceive!" Brief of Common Stockholders Committee herein dated December 8, 1949 at pp. III, X, XI.

3. In the spring of 1952 Mr. Nichols, on his own behalf and purportedly on behalf of the Common Stockholders Committee, and again represented by Mr. Aron, petitioned the Court of Appeals to reopen this reorganization on the ground of fraud, and this petition was denied on the merits,

Matter of Long Island Lighting Co., 197 F. 2d 709 (Judges Swan, Chase and Clark).

4. In the fall of 1952 Mr. Nichols, individually, as a representative of other stockholders of the Company similarly situated, and for the Common Stockholders Committee sued the Company for $27,500,000, alleging that the reorganization had been fraudulently procured, and in support of his conclusion showed the same matter relating to stockholder oppression, earnings, depreciation, S.E.C. jurisdiction and the Consolidated Edison offer. Judge Inch dismissed this action as a forbidden collateral attack on the reorganization decree, but the order of dismissal, until its subsequent modification, was without prejudice to proceedings Mr. Nichols might desire to undertake herein based on the allegations of his complaint. The Court of Appeals (Judges L. Hand. A. N. Hand and Swan) affirmed for the reason given by Judge Inch, and also because the action was *res judicata*. 207 F. 2d 931. The Court stated:

> "* * * the defendant argues that the proceedings in this court in review of the consolidation plan act as a complete bar to the plaintiffs' claim here. We agree with this argument. The plaintiffs strenuously opposed the the approval of the plan in those proceedings and at that time presented most of the claims made here. They have not presented us with any new claims of fraud that were not known at the time of our decision on the motion to reopen the order in 1952. 197 F. 2d 709. While the claims made here may sound in tort they are really the same claims heretofore litigated and determined by us against the plaintiffs.
>
> "For the foregoing reasons we affirm the order of dismissal both because our prior decisions are *res*

judicata and as such a bar to the present action, and also because collateral attack upon a judgment already rendered is not in our opinion permissible. *Furthermore we see no reason under the circumstances why the plaintiffs should be allowed to proceed further on a direct attack against the consolidation decree on the basis of the claims before us because they have been passed on before.*" (Emphasis added) p. 934.

Following this decision, and completely ignoring its plain language, Mr. Nichols moved in the District Court for an order compelling the Commissioners of the S.E.C. to come to New York to review testimony he proposed to adduce in support of his complaint in *Nichols* v. *Long Island Lighting Co.* This was the first of three occasions upon which he has ignored affirmances by the Court of Appeals of dismissals of his complaints and has sought to have the District Court proceed as though there had been no dismissals. Judge Inch dismissed that motion because no action was pending. Opinion dated December 24, 1953. Mr. Nichols then asked the Court of Appeals to clarify its earlier opinion, the Court of Appeals reaffirmed its earlier determination, stating:

"* * * we found that the claims presented were not new but had been passed on before or were known at the time of previous attacks on the decree. See, In re Long Island Lighting Co., 2 Cir., 197 F. 2d 709. Thus the plaintiffs should have been barred from proceeding further on the basis of the allegations presented in the complaint. However, Judge Inch's order dismissing the action contained the following clause: 'without prejudice to any further proceedings which the plaintiffs herein may desire to undertake, pursuant to this Court's reserved

jurisdiction in said Civil Action No. 10,413, to vacate or modify the order in the aforesaid action by reason of the allegations set forth in the *complaint herein.*' In view of our further finding of *res judicata* this clause should have been stricken out. Accordingly, we modify our former decision by striking out the above clause, and as modified we affirm the order dismissing the action below.'' 211 F. 2d 392, 393.

Mr. Nichols' petition for certiorari was denied, 348 U. S. 827, as was his request for rehearing 348 U. S. 884.

6. Notwithstanding these plain statements by the Court of Appeals Mr. Nichols then instituted the action *Nichols* v. *Alker* (E. D. N. Y. No. 14890). His complaint set forth the identical matter which the Court of Appeals had previously held to be *res judicata* in *Nichols* v. *Long Island Lighting Co.*, and certain additional allegations which were found to be sham by Judge Galston. Accordingly, Judge Galston dismissed the complaint as *res judicata* and struck it as sham. 126 F. Supp. 679. The Court of Appeals (Judges Waterman, Hincks and Frank) unanimously affirmed, 231 F. 2d 68, since the issues tendered by Mr. Nichols therein had previously been tendered by him in the instant proceedings and in his later unsuccessful attempt to reopen these proceedings on the ground of fraud. In addition, and as the main basis for their affirmance, Judges Waterman and Hincks held that the maintenance of said action constituted a forbidden collateral attack on the decree made herein. They stated that:

''. . . through the device of an apparently independent tort action the plaintiffs below may not bypass the Commission and the enforcement court in

an effort to alleviate their treatment under the plan approved by the reorganization decree." 231 F. 2d at p. 79.

7. The Court of Appeals also plainly stated:

> ". . . Further, we think it proper to suggest that if the plaintiffs, unless they can show further justification than that shown in their present complaints and in those heretofore dismissed, should make yet another motion for reopening to the enforcement court, an order of denial be entered accompanied by an appropriate injunctive order directed to counsel as well as to plaintiffs restraining further litigation against the reorganized company and those individuals who directly or indirectly participated in its reorganization." 231 F. 2d at pp. 79, 80.

8. Mr. Nichols petitioned for rehearing, but rehearing was denied (March 13, 1956) following which Mr. Nichols moved in the Court of Appeals for an order:

> "1. Directing these defendants to answer the allegations of the complaint herein.
>
> 2. Directing the United States District Court for the Eastern District of New York, with all convenient speed, after the filing of said answers, to proceed with trial by jury of the issues presented by the pleadings."

This was the second time in these litigations that Mr. Nichols has ignored the dismissal of his complaint. The Court of Appeals treated this motion as a second petition for rehearing and denied it on June 7, 1956, stating:

> ". . . In our opinion of February 14, 1956, 231 F. 2d 68, we left it open to appellants, if so advised, to

apply under Rule 60 (b) to the enforcement court, the U. S. District Court for the Eastern District of New York, to reopen on the ground of after-discovered evidence of fraud. In order to succeed in reopening the reorganization proceeding, appellants must satisfy the trial court that they now have substantial evidence of fraud which was not obtainable by due diligence in time to present it, either in the original reorganization proceedings or in the subsequent petition filed in 1952, to reopen the reorganization proceedings; and that the petition attempting to reopen is made within 'a reasonable time' as required by Rule 60. We indicated that if such effort was made and denied, the District Court might then consider the appropriateness of enjoining further litigation. 231 F. 2d 68, 79-80. We adhere to these views. Appellees' motion for an injunction against further proceedings based on the allegations of the complaint herein is therefore denied."

Mr. Nichols has since petitioned the Supreme Court for a writ of certiorari to review this decision.

9. Notwithstanding the pendency of his petition for certiorari and the plain and often repeated statements of the Court of Appeals that litigation based on his complaints in the cases previously described should be ended, and the striking of his complaint in *Nichols* v. *Alker* as sham, Mr. Nichols, once again represented by Mr. Aron has moved, purportedly, in that case, that the District Court proceed to the trial of the issues of fraud and conspiracy set forth in that complaint. This marks the third time Mr. Nichols has ignored a dismissal of his complaint. A copy of that motion, which seeks also the issuance of process to compel the presence for examination of some twenty-four individuals and the production of records of Long Island Lighting Co., of Consolidated Edison, of the

S. E. C., of the Federal Power Commission and of voluminous correspondence, and which contains other requests obviously calculated to harass, and the petition in support thereof, are annexed hereto as Exhibit A. Mr. Nichols and Mr. Aron, by the making of this motion, have shown a complete disregard for the foregoing judicial pronouncements. Their reallegation in these motion papers of the identical matters held to be *res judicata* and sham, and their attempt to have the District Court entertain their sham complaint, the dismissal of which has been affirmed, justify the conclusion that Mr. Nichols and his attorney intend to pursue their harassments unless restrained.

10. Moreover, as Mr. Nichols admits, his common shares in the "original Long Island Lighting Company" were "exchanged for stock in the new Company" in 1955 (Petition p. 1). Accordingly, it is submitted that he is estopped from attacking the reorganization plan. *Re Electric Power and Light Corp.*, 176 F. 2d 687; *Kantor* v. *American & Foreign Power Co.*, 197 F. 2d 307. Apparently to avoid the effect of these cases Mr. Nichols tries to show that he was coerced into making the exchange by relating advice from some unnamed person that "accrued dividends would be cancelled unless he then made the exchange" (Petition, p. 1). Such advice, if given, was false. The exchange of old shares for the new shares provided by the reorganization plan and the accrued dividends on such new shares can be made anytime until early in 1960.

Furthermore, Mr. Nichols conceals from this Court that he no longer is a record holder of any common stock of Long Island Lighting Company, nor has he been such a record holder at any time since May 21, 1956 (see affidavit of J. E. Bull dated July 11, 1956, which is annexed hereto as Exhibit B). The full disclosure of his present status would have eliminated any pretense even that this proceeding is brought on behalf of "other stockholders of Long Island Lighting Company similarly situated."

Affidavit of Bertram D. Moll, Read in Support of Foregoing Motion

11. Mr. Nichols' claim that he has been acting as a representative of common stockholders by reason of proxies in his possession which "have never been revoked as far as . . . [he] know[s]" (Petition, p. 3) has been held to be baseless by Judge Galston. 126 F. Supp. at p. 684. Nevertheless, the same claim is repeated here. Furthermore, although there were 3,000,000 shares of common stock held of record by 7,574 persons just prior to the reorganization, there were, as of June 30, 1956, only 17,488 shares of this old common stock outstanding in the hands of 192 persons. It is therefore apparent that the overwhelming majority of such holders have signified their acceptance of the reorganization.

12. To the best of deponent's knowledge and belief, the continuing harassments against the reorganized Company and those who are alleged to have participated directly or indirectly in its reorganization are being waged by just one disgruntled person, Mr. Nichols, of the 7,574 persons who were common stockholders at the time of the reorganization, and by one attorney, Mr. Aron, who apparently still smarts at the characterization by the Court of Appeals, 211 F. 2d at pp. 414-416, of his efforts on behalf of the common stockholders during the reorganization. (Petition, p. 3.)

WHEREFORE, it is respectfully requested that an order supplemental to the order dated February 17, 1950 herein be made specifically enjoining Ennis M. Nichols, the Common Stockholders Committee and Harold G. Aron from taking any further proceedings against the moving parties by reason of the allegations set forth in the complaints in *Nichols* v. *Long Island Lighting Co.* (E. D. N. Y. No. 13054) and *Nichols* v. *Alker* (E. D. N. Y. No. 14890).

/s/ BERTRAM D. MOLL.

(Sworn to July 12, 1956.)

Transcript of Hearing on Foregoing Motion

(Record pages 29-52)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

C. 10413

In the Matter

of

LONG ISLAND LIGHTING COMPANY, QUEENSBOROUGH GAS & ELECTRIC COMPANY, NASSAU & SUFFOLK LIGHTING COMPANY.

C. 14890

ENNIS M. NICHOLS, etc.,

Plaintiffs,

against

HARRY A. ALKER, et al.,

Defendants.

Brooklyn, New York,
October 22, 1956.

Before:

HONORABLE MATTHEW T. ABRUZZO, *U. S. D. J.*

MOTION I (File C. 10413)

Motion for an order supplementai to the order dated February 17, 1950, made herein, specifically enjoining Ennis

Appearances

M. Nichols, the Common Stockholders Committee, and Harold G. Aron from taking further proceedings based on the allegations of their complaints in Nichols vs. Long Island Lighting Company, etc.

MOTION II (File C. 14890)

Motion that the Court proceed to the trial of the issues of fraud and conspiracy as set forth in the complaint herein as mandated by the opinion of the United States Court of Appeals for the Second Circuit on June 7, 1956.

Appearances:

HAROLD G. ARON, Esq.,
(8300 Talbott Street, Kew Gardens, New York),
Attorney for Plaintiffs.

DAVID K. KADANE, Esq.,
(250 Old Country Road, Mineola, L. I., N. Y.),
Pro se, and Long Island Lighting Company and various individual defendants.

CHARLES C. LOCKWOOD, Esq.,
(30 Pine Street, New York, N. Y.),
Attorney for defendant Vanneck.

W. M. GOIDELL, Esq.,
(68 William Street, New York, N. Y.),
Attorney for defendant Jackson.

WINTHROP, STIMSON, PUTNAM & ROBERTS, Esqs.,
(40 Wall Street, New York, N. Y.),
Attorneys for defendant Marks, by PETER H. KAMINER, Esq., of Counsel.

Colloquy of Court and Counsel

The Court: Who appears for the motion?

Mr. Kadane: I do, sir. I represent the Long Island Lighting Company and various individual defendants.

The Court: Go right ahead.

Mr. Kadane: The motion before the Court is for the entry of an injunction order specifically restraining Ennis M. Nichols, a former stockholder of the company, and his counsel, Mr. Aron, who is present here, from continuing a course of litigation that has been going on now for about six years and which has been in the courts maybe fourteen times. And, frankly, sir, we feel oppressed by it. We feel that we are entitled to an injunction against any further continuation of it.

Now, the last time this was in the courts was when it was in the United States Court of Appeals, and the Court of Appeals specifically stated that if this kind of thing continues to go on it is time to enter an injunction and prevent it from going on any further.

The last pronouncement of the Court of Appeals was as follows.—and I am quoting now from the opinion of the Court:

> "* * * we think it proper to suggest that if the plaintiffs, unless they can show further justification than that shown in their present complaints and in those heretofore dismissed, should make yet another motion for reopening to the enforcement court, an order of denial be entered accompanied by an appropriate injunctive order directed to counsel as well as to plaintiffs restraining further litigation against the reorganized company and those individuals who directly or indirectly participated in its reorganization."

And in a subsequent opinion the Court of Appeals said—this was on a further motion, in effect a motion for a

rehearing—the Court said the following—clarifying that language still further:

> "In order to succeed in reopening the reorganization proceeding appellants must satisfy the Trial Court that they now have substantial evidence of fraud which was not obtainable by due diligence in time to present it either in the original reorganization proceedings or in the subsequent petition filed in 1952, to reopen the reorganization proceedings; and that the petition attempting to reopen is made within a 'reasonable time' as required by Rule 60. We indicated that if such effort was made and denied the District Court might then consider the appropriateness of enjoining further litigation."

And that is why we are here, because the further attempt has been made. The further attempt was made in the last piece of litigation. Nichols against Alker was the fifty-million-dollar suit against some twenty-four individuals.

Despite the fact that the complaint in that action had been dismissed and stricken from the files of the Court as sham, and that the Court of Appeals affirmed it, and that the Supreme Court subsequently denied certiorari, so that there seems to be no proceeding pending, Mr. Aron has filed a further motion in this court moving that the matter proceed to trial. There can be nothing new, so he has not done what the Court of Appeals said would have to be done. He hasn't alleged anything subsequent to the spring of 1952. And, secondly, excused any possible laches that there might be. And, consequently, all the conditions that the Court of Appeals set up for the entry of an order to relieve us from this oppression have now been met.

Now, I say oppression, your Honor, and I think I must tell you that there really has been oppression here.

Fourteen times we have had to come before the Courts to defend ourselves against irresponsible charges of fraud—fourteen times in six years—and, your Honor, I submit that that is at least thirteen times too many.

And I want to explain to your Honor the kind of thing we have to defend ourselves against.

We are defending ourselves against—and I say this knowing that it is on the record—against falsehoods, and I want to be specific with respect to some of these falsehoods.

First of all, the complaint In the Matter of—I am picking out just four things now, and I could pick out fourteen things, but these are four things that come to my mind—the complaint in Nichols against Alker, the most recent litigation, was not verified. We looked at the original complaint and we saw that it was not verified. We told the Court of Appeals that it was not verified. Mr. Aron insisted that it was verified. The Court of Appeals' opinion refers to the unverified complaint.

In the Supreme Court on the petition for certiorari Mr. Aron referred to the complaint as verified. We told the Supreme Court in our answering brief that it was not verified, and Mr. Aron then filed a reply brief in which he says, "The following statements in appellees' brief are false and misleading:

> "1. The complaint was not unsworn, but was actually verified by the plaintiff, Ennis M. Nichols, before a notary public."

In other words, in his reply brief in the Supreme Court, as well as in all other places, he is telling the Supreme Court that we made false and misleading statements, when the fact of the matter is that that is what he has done from beginning to end in this case.

The Nichols against Alker complaint was an unverified, unsworn complaint, and this man refuses to stop telling

the Courts that that is not the case. And that is an outrage.

Second, one of the complaints that Mr. Aron and Mr. Nichols have had from the beginning, away back in 1950, was that they did not have due process of law in the consolidation proceedings, and they explained that the reason they did not have due process of law in the consolidation proceedings, or at least one of the reasons is, that they got only a limited right to participate from the Securities & Exchange Commission in the consolidation proceedings—only a limited right.

We have consistently pointed out that that limited right that they got included the right to adduce evidence, cross-examine witnesses, file briefs, and make oral argument, and that counsel for the Common Stockholders group, including Mr. Aron, had actually availed themselves of all of those rights.

W said that to the Supreme Court in our brief, and this is what we were met with. "On page 10, Appellee's counsel, most of them more than familiar with S.E.C. practice under the Public Utilities Holding Companies Act, make a completely misleading statement as to the scope of a 'limited participation' and underline it with the consummate falsehood, all of which he did."

All we have said was that they adduced evidence, cross-examined witnesses, filed briefs, and made oral argument. All of which he did. And all of those he did. And he has the consummate nerve to tell the Supreme Court of the United States that we have uttered a falsehood, and we think it is time to stop that kind of nonsense from going on.

Now, a third example. The complaint in Nichols against Alker, among other things that aren't so, says that Mr. Charles Elbert, the Secretary of Long Island Lighting Company, and a member of the Bar, and a member of this

Court, gave false and misleading testimony in the proceedings before the Securities & Exchange Commission.

The fact of the matter is that Mr. Elbert did not even testify before the Securities & Exchange Commission. We pointed that out in affidavits, and to this day Mr. Aron has refused to withdraw that allegation. That is an allegation of perjury, and he refuses to withdraw it. In other words, he is in effect reasserting it as of this moment. All he says with respect to it is—as to Mr. Elbert—"The records contain a ten-page printed misleading affidavit sworn to by him and submitted by the company on a subsequent application in this court."

But the thing that the complaint alleges is that Mr. Elbert testified before the Securities & Exchange Commission falsely, and he did not even testify, and it is time to stop a man who goes around saying things like that under the protection of Court process. The processes of this Court are being abused when a man is allowed to lie simply because it is a pleading—an unsworn pleading.

And, fourth, with respect to myself. I left the Securities & Exchange Commission on or about the first day of March, 1946, and I was retained by the Long Island Lighting Company in September of 1946, having spent the interim time with the National Housing Agency. Mr. Aron got hold of a typewritten statement which had been made to somebody by the Personnel Director of the Securities & Exchange Commission to the effect that I was still in the employ of the Securities & Exchange Commission on December 5th, 1946, which of course was subsequent to the date I was retained by the Long Island Lighting Company.

I filed an affidavit in the proceeding stating what the facts were, and subsequently Mr. Becker, the Personnel Director of the Securities & Exchange Commission, the man who had signed the first, unsworn statement, filed an affidavit in which he specifically said that his earlier statement was a clerical error, and that the things that I said in my affidavit were true.

Despite that fact, which certainly ought to clear up the situation beyond any doubt, we have Mr. Aron telling the Supreme Court of the United States in the same reply brief, on page 9: "Respondents evade the documented facts as to Kadane's original employment by S. E. C."—"evade the documented fact."

In short, Mr. Aron has not withdrawn his contentions based upon an unsworn statement of Mr. Becker which has subsequently been withdrawn under oath. He is, in short, persisting in alleging something which, if he is a rational man, he himself knows is not true.

Now, your Honor, under those circumstances, I respectfully submit that we are being harassed.

These are four examples of falsehoods which are being told to the Courts.

I have picked out these four merely because they happen to be in the most recent document he filed, which is the reply brief in the Supreme Court of the United States. I could take every document that he has filed and recite not four but fourteen similar falsehoods that are in them.

We have been oppressed. We feel we have stood it long enough, and we feel that it is time, in the vernacular, to lower the boom on this man.

Thank you.

The Court: All right, Mr. Aron.

Mr. Aron: If your Honor please, I have nothing to add to what is in the record, and I stand by everything I say.

The Court: Oh, no. I want to answer what has just been said to me.

Mr. Aron: What?

The Court: Well, this complaint that is now before me, is this a brand new complaint?

Mr. Aron: There was originally an action against the Long Island Lighting Company, a similar complaint—

The Court: I know that, but is this a new action?

Mr. Aron: Yes, this is a new action.

The Court: When did you start this action?

Mr. Aron: I don't recall the date. It must have been two years ago.

The Court: You have to tell me, sir. You have to be ready to answer my questions. It is a fairly recent argument. In the last year?

Mr. Aron: Two years ago.

The Court: All right. Was it after the Circuit Court made its decision, or did the Circuit Court of Appeals pass on this complaint?

Mr. Aron: The Circuit Court of Appeals passed on that complaint.

The Court: On the complaint that is now before me?

Mr. Aron: Correct.

The Court: All right. Now you want the case tried. Is that right?

Mr. Aron: I want the issue of fraud and collusion tried.

The Court: Now the Circuit Court of Appeals says that you have no right to have that case tried. What do you say to that?

Mr. Aron: I will let them speak for themselves, your Honor. Your Honor, I have before you the last opinion—

The Court: Well, if the Circuit Court of Appeals says I have no right to let the case go to trial, how can I let it go to trial? They are my superiors.

Mr. Aron: Well, I will let you read the opinion, and keep this thought in mind. Here is what the Court of Appeals said. This is the last word. Shall I read the whole opinion? It is only a short one.

The Court: No. Just the part of the opinion which you say tells me that I can let you go to trial.

Mr. Aron (Reading): "Appellees have filed a cross-motion seeking to enjoin appellants and their attorneys

from taking any further steps in the within action and from instituting any further action or proceedings based on the allegations of the complaint in the within action. In our opinion of February 14, 1956, we left it open to appellants, if so advised, to apply under Rule 60(b) to the enforcement court, the United States District Court for the Eastern District of New York, to reopen on the ground of after-discovered evidence of fraud.

"In order to succeed in reopening the reorganization proceeding appellants must satisfy the trial court that they now have substantial evidence of fraud which was not obtainable by due diligence in time to present it either in the original reorganization proceedings or in the subsequent petition, filed in 1952, to reopen the reorganization proceedings; and that the petition attempting to reopen is made within a 'reasonable time' as required by Rule 60. We indicated that if such effort was made and denied the District Court might then consider the appropriateness of enjoining further litigation. We adhere to these views. Appellees' motion for an injunction against further proceedings based upon the allegations of the complaint herein is therefore denied."

I immediately filed a petition which is now before your Honor for decision.

The Court: You mean the next motion?

Mr. Kadane: Yes, sir.

The Court: Your motion?

Mr. Aron: The instant motion, yes.

The Court: All right. Now, suppose you tell me, on the next motion, what evidence of fraud you have now that you did not have at the time the Circuit Court of Appeals decided this case?

Isn't that the issue now?

Mr. Aron: No. The issue is what we didn't have at the time the case was before the Securities & Exchange Commission.

Colloquy of Court and Counsel

The Court: Well, what have you got now that is new?

Mr. Aron: In 1952—that was after the—

The Court: I assume that what you are telling me now you can support—If you have anything new you have affidavits to that effect before me?

Mr. Aron: It is documented in the record before you now.

The Court: What do you mean by "it is documented in the record"?

Are you resting on the record as it stood before the Circuit Court of Appeals?

Mr. Aron: No, sir.

The Court: Well, have you anything to add to it?

Mr. Aron: No, your Honor. We have never been permitted to offer any evidence. The evidence itself is documented in the record before the Securities & Exchange Commission, and came to our attention two years after the Court of Appeals had affirmed the enforcement order, when, in the fee applications, it was revealed that in 1942 these defendants and their counsel definitely decided to invent a ground—invent was the word they used—by which the Long Island Lighting reorganization would be taken away from the Public Service Commission of New York, which had just made an order reorganizing the Long Island Lighting Company, and which the Court of Appeals refused to interfere with.

Now, on that hearing it was revealed. And I say it is documented. There are letters which I would like to offer in evidence showing that they planned, schemed and devised this conspiracy to get the case away from the Public Service Commission of New York, which was superseded by the Securities & Exchange Commission, for which Mr. Kadane then appeared as counsel in the Court of Appeals, when the Court of Appeals refused to interfere with the New York reorganization. I have designated that.

Colloquy of Court and Counsel

The Court: All right. Now, what is the date of the two last Circuit Court of Appeals decisions, Mr. Aron?

Will you put that on the record? What are the dates of those two Circuit Court of Appeals decisions?

Mr. Aron: Here is one in 1956, February 14, 1956, and then the opinion of June 8, 1956.

The Court: All right. Now, weren't all the matters that you are now alleging on this record before the Circuit Court of Appeals when they made those two decisions?

Mr. Aron: They have never been before any Court. No evidence has ever been admitted since the original complaint was filed.

The Court: Well, didn't they say in their decision that unless you had other evidence besides that which was before them, this Court could entertain a motion to enjoin? Didn't they say that?

Mr. Aron: I don't like to quote—I will read it again—"In order to succeed in reopening the reorganization proceeding appellants must satisfy the trial court that they now have substantial evidence of fraud which was not obtainable by due diligence in time to present it either in the original reorganization proceedings or in the subsequent petition, filed in 1952, to reopen the reorganization proceedings."

The Court: Well, this complaint was before the Circuit Court of Appeals, wasn't it?

Mr. Aron: Yes, but there was no evidence—

The Court: I can't help that. Didn't the Circuit Court of Appeals lay down the rule to you—

Mr. Aron: This is what the Court said—

The Court: —that unless you could satisfy this Court that you had other substantial evidence besides that which was before them, that then, in our discretion, this court could issue an injunction? Isn't that what they said?

Mr. Aron: I will read you their language.

"In order to succeed"—

The Court: Well, that is what they said.

What other new evidence have you to present before me that wasn't before the Circuit Court of Appeals at the time they ruled?

Mr. Aron: We have never presented, in any court, in the Court of Appeals or in any other court, in any judicial tribunal or in any court, any evidence.

The Court: What was the Circuit Court of Appeals opinion based on? What was that based on?

Mr. Aron: It was a motion to—

The Court: It was based on the sufficiency of the complaint?

Mr. Kadane: No—May I answer that? If your Honor doesn't mind, may I make a number of connected comments with respect to that?

The Court: No; I would like to know what the issue before the Circuit Court of Appeals was on their February 14th decision. Of course, the June opinion followed the February opinion.

Mr. Kadane: The issue was the propriety of the dismissal of the complaint, and the Court held—first of all, the Court held that it was proper to dismiss the complaint because, number one, the matter should have been raised, if any place, in the consolidation proceedings, and not collaterally; and, secondly, if it had been raised in the consolidation proceedings, it was nothing more than the same old junk which had been passed on time and time again and should have been thrown out.

The Court: Was that what was before the Circuit Court of Appeals, Mr. Aron?

Mr. Aron: No; I do not so construe it.

The Court: What do you say was before the Circuit Court of Appeals on that decision of February 14th?

Mr. Aron: Judge Galston's finding plaintiff's counsel guilty of contempt and dismissing the complaint. The

Court of Appeals, if your Honor will look at the opinion which you have here, divided it as to why—

The Court: I don't care about how it was divided. What was it affirming? What was before the Court? Mr. Kadane says the dismissal of the complaint was before the Court.

Mr. Aron: That is correct.

The Court: Judge Galston dismissed this complaint?

Mr. Aron: He did.

The Court: And the Circuit Court of Appeals affirmed, but left it open to you so that if you could show any evidence of fraud that dismissal could be corrected. Isn't that what is really before this Court?

Mr. Aron: Correct.

Mr. Kadane: Yes, sir.

The Court: Have you any evidence of fraud?

Mr. Aron: I have yet submitted no evidence to this court or to any court.

The Court: Well, submit it to me.

Mr. Aron: I will if your Honor grants the motion. I have named the persons—

The Court: No; you will have to submit it in affidavit form here.

Mr. Aron: Well, that will be done.

Mr. Kadane: Your Honor, may I—

The Court: No—I am going to give him a chance to submit affidavits.

Mr. Kadane: Very well.

The Court: I don't want you to give me affidavits of conclusions of fraud. I want you to give me affidavits of factual fraud.

Mr. Aron: Documented?

The Court: Evidence of fraud that you did not have at the time the Circuit Court of Appeals passed on Judge Galston's dismissal in February. It must be something

that you did not have at that time or that you could not have discovered with due diligence.

Mr. Aron: No, it is nothing like that at all.

The Court: Well, now, I am going to make a ruling for you. You can follow it or not. I don't care whether you follow it. I am making the ruling that you must submit evidence of fraud to me, that you have discovered since the Circuit Court of Appeals passed upon this matter in February or June, or evidence of fraud that you, with due diligence, in February or June of this year, were not able to discover, and have discovered since.

Now, it is as simple as that, and I will give you as much time as you want to submit the affidavits.

How much time do you want?

Mr. Aron: Well, may I point out to your Honor that we have discovered no evidence since the Court of Appeals heard this? We have discovered no new evidence since 1952.

The Court: Then you stand on the record as the Circuit Court of Appeals had it?

Mr. Aron: Exactly.

The Court: All right, then I am going to issue the injunction. That is that.

All right, now what is the next motion?

Mr. Aron: Well, that is the—

Mr. Kadane: The next motion, your Honor, is—We are the defendants in the case—it is a motion by Mr. Aron in Nichols against Alker for an order setting the matter down for trial.

The Court: Well, of course, that is academic.

Mr. Kadane: Yes.

The Court: That is denied because of the decision I made in the first motion.

All right, make the proper recitals and attach these minutes to the order, please.

Mr. Kadane: Thank you, sir.

The Court: I think that these minutes should go with the order to show, if an appeal is taken, on what I based my decision.

Mr. Aron: May I be furnished with a copy of the minutes?

The Court: Yes, if you will pay for them. I can't order the Court Reporter to furnish them to you unless you pay for them.

Mr. Kadane, you will have to pay for your copy of the minutes—

Mr. Kadane: Yes, your Honor.

The Court: And I want a copy of the minutes for my records.

Mr. Kadane: Yes, your Honor.

The Court: All right.

(Hearing concluded.)

Supplemental Order Appealed From in Action No. 10413

(Record pages 53-59)

A certain amended plan of consolidation and recapitalization of Long Island Lighting Company, Queens Borough Gas and Electric Company and Nassau & Suffolk Lighting Company which had been found fair and equitable and to effectuate the provisions of Section 11(b) of the Public Utility Holding Company Act of 1935, having been approved and enforced by this Court by order dated February 17, 1950 (hereinafter called "the reorganization decree") over the opposition of the Common Stockholders Committee of Long Island Lighting Company (hereinafter some-

times referred to as "the Committee") represented by Harold G. Aron, who, except as indicated, has appeared as attorney for the Committee and Ennis M. Nichols in all the proceedings hereinafter set forth, and of Ennis M. Nichols, a member of the Committee; and the Committee having appealed to the Court of Appeals from the reorganization decree; and the Court of Appeals having affirmed the reorganization decree (183 F. 2d 45); and the Committee having petitioned the Supreme Court for a writ of certiorari to review the reorganization decree; and the Supreme Court having denied a writ of certiorari (340 U. S. 834); and the Committee and Ennis M. Nichols having moved in the Court of Appeals to reopen the instant proceedings or to obtain leave to file a bill of review in this Court on the ground that the reorganization decree had been entered "under circumstances tantamount to fraud effected and committed by said Long Island Lighting Company upon the Securities and Exchange Commission," this Court and the Court of Appeals; and the Court of Appeals having denied said motion, finding that the "facts alleged in the petition do not show that fraud was practiced upon the Commission [the Securities and Exchange Commission], the District Court, or this Court [the Court of Appeals]" (197 F. 2d 709, 710); and the Committee and Ennis M. Nichols having sued the reorganized Long Island Lighting Company in an independent tort action entitled *Nichols et al.* v. *Long Island Lighting Co.*, E.D.N.Y. Civil No. 13054, alleging that Long Island Lighting Company's predecessor corporation through its officers, directors and agents, conspired with certain of its preferred stockholders to defeat rights of the plaintiffs by the procurement of the reorganization decree; and the said action having been dismissed by this Court as being a forbidden collateral attack on the reorganization decree (order dated January 12, 1953); and

the Committee and Ennis M. Nichols having appealed to the Court of Appeals from said dismissal; and the Court of Appeals having affirmed said dismissal on the grounds that said action was a forbidden collateral attack on the reorganization decree, and was also *res judicata*, stating "* * * we see no reason under the circumstances why the plaintiffs should be allowed to proceed further on a direct attack against the consolidation decree on the basis of the claims before us because they have been passed on before" (207 F. 2d 931, 934); and, thereafter, the Committee and Ennis M. Nichols having moved in this Court for an order compelling the commissioners of the Securities and Exchange Commission to receive testimony they proposed to adduce in support of the complaint in *Nichols et al.* v. *Long Island Lighting Co.*; and said motion having been dismissed (order dated January 19, 1954); and the Committee and Ennis M. Nichols having asked the Court of Appeals to clarify its affirmance of the dismissal of said complaint; and the Court of Appeals having reaffirmed its affirmance of the said dismissal, stating "* * * we found that the claims presented were not new but had been passed on before or were known at the time of previous attacks on the [reorganization] decree. See, In re Long Island Lighting Company, 2 Cir., 197 F. 2d 709. Thus the plaintiffs should have been barred from proceeding further on the allegations presented in the complaint." (211 F. 2d 392); and the Committee and Ennis M. Nichols having petitioned the Supreme Court for a writ of certiorari to review the dismissal of said complaint; and the Supreme Court having denied a writ of certiorari (348 U. S. 827); and the Committee and Ennis M. Nichols having petitioned the Supreme Court for a rehearing on said petition for a writ of certiorari; and the Supreme Court having denied rehearing (348 U. S. 884); and the Committee and Ennis M. Nichols, represented by Berenson & Meisels,

Esqs., having sued alleged officers, directors and agents of Long Island Lighting Company in an independent tort action entitled *Nichols et al. v. Alker et al.*, E.D.N.Y. Civil No. 14890, alleging that Long Island Lighting predecessor corporation through its officers, directors and agents conspired with certain of its preferred stockholders to defeat rights of the plaintiffs by the procurement of the reorganization decree; and the said action having been dismissed and stricken as sham by this Court (126 F. Supp. 679); and the Committee and Ennis M. Nichols represented by Harold G. Aron in this and in all the succeeding proceedings hereinafter set forth, having appealed to the Court of Appeals from said dismissal; and the Court of Appeals having affirmed said dismissal, stating "* * * we think it proper to suggest that if the plaintiffs, unless they can show further justification than that shown in their present complaints and in those heretofore dismissed, should make yet another motion for reopening to the enforcement court, an order of denial be entered accompanied by an appropriate order directed to counsel as well as to plaintiffs restraining further litigation against the reorganized company and those individuals who directly or indirectly participated in its reorganization." (231 F. 2d 68, 79, 80); and the Committee and Ennis M. Nichols having petitioned the Court of Appeals for a rehearing; and the Court of Appeals having denied rehearing (order dated March 13, 1956); and the Committee and Ennis M. Nichols having moved in the Court of Appeals for an order directing the defendants named in *Nichols et al.* v. *Alker et al.* to answer the complaint therein and proceed to trial; and the Court of Appeals having treated said motion as a second request for rehearing and having denied it, stating "* * * In our opinion of February 14, 1956, 231 F. 2d 68, we left it open to appellants, if so advised, to apply under Rule 60(b), Fed. Rules Civ. Proc. 28 U.S.C.A. to the enforcement

court, the U. S. District Court for the Eastern District of New York, to reopen on the ground of after-discovered evidence of fraud. 126 F. Supp. 679. In order to succeed in reopening the reorganization proceeding, appellants must satisfy the trial court that they now have substantial evidence of fraud which was not obtainable by due diligence in time to present it either in the original reorganization proceedings or in the subsequent petition, filed in 1952, to reopen the reorganization proceedings; and that the petition attempting to reopen is made within a reasonable time as required by Rule 60. We indicated that, if such effort was made and denied, the District Court might then consider the appropriateness of enjoining further litigation. 231 F. 2d 68, 79-80. We adhere to these views." (235 F. 2d 246, 247); and the Committee and Ennis M. Nichols having petititned the Supreme Court for a writ of certiorari to review the dismissal of said complaint; and the Supreme Court having denied a writ of certiorari (— U. S. —, October 8, 1956); and the Committee and Ennis M. Nichols having moved in this Court upon the identical matter previously shown to the Court of Appeals for an order requiring said defendants in *Nichols et al.* v. *Alker et al.* to answer the complaint therein and proceed to trial; and the said motion having been denied (order dated October 25th, 1956); and Long Island Lighting Company, by its attorney David K. Kadane, Esq., and Messrs, Barrett, Fraser, Hausman, Carpenter, Doebler, Olmsted, Hagerty, Booth, Miles, Langley, Elbert, Coe, Crummey, Tegen and Koons, and Mrs. Blakeslee, as Executrix of the Estate of Charles G. Blakeslee, by their attorney, David K. Kadane, Esq., and Percival E. Jackson, Esq., Pro Se, and Mr. Marks, by Winthrop, Stimson, Putnam and Roberts, Esqs., his attorneys and Mr. Vanneck, by Charles C. Lockwood, Esq., his attorney, the

individuals who are alleged in the said complaint to have participated directly or indirectly in the proceedings leading to the reorganization of said Company, having moved in this Court for a supplemental order herein specifically enjoining the Committee, Ennis M. Nichols and Harold G. Aron, and each of them, from taking further proceedings based on the allegations of their complaints in *Nichols et al.* v. *Long Island Lighting Co.*, E.D.N.Y. Civil No. 13054 and *Nichols et al.* v. *Alker et al.*, E.D.N.Y. Civil No. 14890, and said attorneys having appeared in support of said motion, and Harold G. Aron, Esq., Pro Se, and as attorney for the Committee and for Ennis M. Nichols, having appeared and argued in opposition thereto.

Now, upon all of the papers submitted on this motion and upon the proceedings heretofore set forth, and upon the transcript of the argument on this motion (which is annexed hereto as Exhibit A)—the transcript of minutes indicates clearly there is no new or additional evidence of fraud—and the Court having duly considered the matter and being fully advised in the premises, it is hereby

ORDERED that the Common Stockholders Committee of Long Island Lighting Company, Ennis M. Nichols and Harold G. Aron, and each of them, be and they hereby are permanently enjoined and restrained from commencing or prosecuting any action, suit or proceeding, at law or in equity, in any court or before any executive or administrative officer, commission or tribunal, based on the allegations of wrong-doing, fraud or conspiracy, or any of such allegations contained in the complaints in *Nichols et al.* v. *Long Island Lighting Co.*, E.D.N.Y. Civil No. 13054, and *Nichols et al.* v. *Alker et al.*, E.D.N.Y. Civil No. 14890, copies of which are annexed hereto as Exhibits B and C, respectively; provided, however, that nothing herein contained shall prevent the Common Stockholders Committee

of Long Island Lighting Company, Ennis M. Nichols and Harold G. Aron, or any of them, from seeking a review of this supplemental order.

By the Court.

/s/ MATTHEW T. ABRUZZO,
United States District Judge.

Dated: October 26, 1956,
Brooklyn, New York.

Notice of Appeal in Action No. 10413

(Record page 101)

NOTICE IS HEREBY GIVEN that the Common Stockholders' Committee of Long Island Lighting Company, Ennis M. Nichols and Harold G. Aron, and each of them, hereby appeals to the United States Court of Appeals for the Second Circuit from the Supplemental Order of this Court, entered in this proceeding on October 26, 1956, permanently enjoining and restraining the said Common Stockholders' Committee of Long Island Lighting Company, Ennis M. Nichols and Harold G. Aron, and each of them, from commencing or prosecuting any action, suit or proceeding, at law or in equity, in any Court or before any executive or administrative officer, commission or tribunal, based on the allegations of wrong-doing, fraud or conspiracy, or any of such allegations contained in the complaints in *Nichols, et al.* v. *Long Island Lighting Co.*, E. D. N. Y. Civil No. 13054, and *Nichols, et al.* v. *Alker, et al.*, E. D. N. Y. Civil No. 14890.

HAROLD G. ARON,
Attorney for Common Stockholders Committee, etc., Ennis M. Nichols and Harold G. Aron,
Office & P. O. Address,
Madison, Connecticut.
New York City Address,
8300 Talbot Street,
Kew Gardens, L. I., N. Y.

Extract from Docket Entries in Action No. 14890

(Record pages A to D)

Date	*Proceeding*
7-5-56	Notice of motion filed to proceed to trial on certain issues, etc. (7/18/56).
7-18-56	Abruzzo, J.—Above motions submitted—all papers by 8/1/56. Affidavit of Bertram D. Moll filed.
10-15-56	By Abruzzo, J.—Notice of hearing on 10/22/56, 10:30 A. M. filed (notices mailed out).
10-22-56	Before Abruzzo, J.—Hearing on motion for trial denied. Settle order on notice.
10-23-56	Transcript of record (hearing of 10/22/56) filed in folder #10413.
10-25-56	By Abruzzo, J.—Order filed denying motion for trial, etc.
11-16-56	Notice of appeal filed. Copy of instructions handed to atty. Bond on appeal filed.
12-18-56	By Abruzzo, J.—Order filed extending time to file record on appeal to 2/14/56.
1-13-57	Stipulation as to contents of record on appeal filed.

Notice of Motion in Action No. 14890 for Order That Court Proceed to Trial of Issues of Fraud and Conspiracy

(Record pages 2-6)

PLEASE TAKE NOTICE that on the petition of Ennis M. Nichols on behalf of himself and the above named plaintiffs, the undersigned will move this Court at a motion part thereof, on the 18th day of July, 1956, at 10 A. M., or as soon thereafter as counsel can be heard, in the United States Court House for the Eastern District of New York, 271 Washington Street, Borough of Brooklyn, City and State of New York, that the Court proceed to the trial of the issues of fraud and conspiracy, as set forth in the complaint herein, as mandated by the annexed opinion of the United States Court of Appeals, for the Second Circuit on June 7, 1956, and as the said issues are more explicitly stated in the annexed petition for certiorari herein, as filed in the Supreme Court of the United States on the 8th day of June, 1956, and already served on defendants' counsel, without knowledge by petitioner or counsel of the aforesaid opinion of June 7th.

As counsel is not informed as to any rules or practice in force or prevailing on such a mandated referral, petitioner further asks:

1. That for the aforesaid purpose, this Court issue its process to compel the presence at such trial of the following named persons for examination and taking of their testimony:

From *Long Island Lighting Company*: Messrs. Edward F. Barrett, David K. Kadane, Eric Doebler, Robert G. Olmstead;

From the *Consolidated Edison Company*: Messrs. R. H. Tapscott, Randall J. Laboef, H. C. Forbes, and one Delafield;

Notice of Motion in Action No. 14890 for Order That Court Proceed to Trial of Issues of Fraud and Conspiracy

From the *Securities and Exchange Commission*: Messrs. M. E. Yohalen, Solomon Freedman, Myron S. Isaacs;

From the *Preferred Stockholders Committees*: Messrs. William Duff of Duff & Phelps, George S. Munson, Lawrence M. Marks, Lee P. Stack, Milton Pollack, Jeffrey Granger, Albert E. Olson, Benjamin F. Gray, Percival Jackson, William C. Langley;

From the *Common Stockholders Committee*: Dwight Sullivan, Esq.;

From the *Creditors*: Bernard D. Fishman, Esq.;

From the *Interstate Commerce Commission*: Edward M. Reidy, Esq., or his successor in office as General Counsel of the Interstate Commerce Commission.

II. Petitioner further asks that this Court issue its process to compel the production for inspection and use as evidence on the issues herein of the following books, records, reports, correspondence and documents:

The corporate minute books of the Long Island Lighting Company regarding action taken or reported at all meetings of its stockholders and directors for and since the year 1944 and for the same period the record reports, documents and written communications of the Consolidated Edison Company of New York; complete records of the SEC and the Federal Power Commission, including stenographic reports of all hearings before said administrative agencies having directly or indirectly to do with Long Island Lighting Company as organized prior to and since the proceedings referred to in the foregoing opinion.

III. Petitioner further asks that this Court order and direct the attorneys for the defendant to produce and deposit with the Clerk of this Court copies of all briefs, affidavits and exhibits heretofore filed herein and in the action hereto-

Notice of Motion in Action No. 14890 for Order That Court Proceed to Trial of Issues of Fraud and Conspiracy

fore instituted by these plaintiffs against the Long Island Lighting Company.

IV. Petitioner further asks this Court to order and direct the persons named in Paragraph No. 1 hereof to produce all correspondence between them or any of them having directly or indirectly to do with the Long Island Lighting Company during and since 1944.

V. Petitioner further asks this Court to order and direct the officers and directors of the Long Island Lighting Company to produce all registration statements and records in connection therewith filed with or presented to the SEC in connection with the offering for public sale, bonds, preferred and common stock of the Long Island Lighting Company since the affirmance of enforcement order in the proceedings referred to in the aforesaid opinion of the Court of Appeals, together with all annual reports made by the LILCO for and since the year 1944.

VI. Petitioner further asks this Court to order and direct the SEC and LILCO to produce the full and complete record of their respective employment of David K. Kadane.

VII. Petitioner further asks this Court to order and direct all attorneys employed by LILCO, Con Edison, and the Preferred Stockholders Committees in the proceedings before the SEC and the PSC having to do with LILCO since 1944 to file with this Court statements of all amounts received by them as fees, disbursements or otherwise from the aforesaid companies and committees during the period stated.

VIII. Petitioner is prepared to submit to this Court, if the Court will receive the same, a statement setting forth the facts to be proved by the testimony of the persons named in Paragraph No. 1, and the documented evidence

Notice of Motion in Action No. 14890 for Order That Court Proceed to Trial of Issues of Fraud and Conspiracy

contained in the records and papers referred to in Paragraph No. 2.

Petitioner on behalf of the Plaintiffs' Committee also asks the sanction of this Court to there being made now the solicitation for funds to carry forward this litigation which right, on the objection of LILCO and SEC, has been heretofore denied under the divided opinion of the Court of Appeals for the District of Columbia (182 F. 2d 660).

(Signed) HAROLD G. ARON,
Madison, Connecticut,
N. Y. Address: 37 Wall Street,
New York 5, N. Y.,
(Guthrie and Company).

To:

CHARLES C. LOCKWOOD, Esq.,
Attorney for Appellee Vanneck,
30 Pine Street,
New York, New York.

PERCIVAL E. JACKSON, Esq.,
Pro Se.,
68 William Street,
New York, New York.

DAVID K. KADANE, Esq.,
Attorney for Appellees Barrett, Fraser, Hausman, Blakeslee, Carpenter, Coe, Doebler, Link, Olmsted, Crummey, Hagerty, Booth, Tegen, Koons, Miles, Langley, Elbert and Pro Se.,
250 Old Country Road,
Mineola, New York.

WINTHROP, STIMSON, PUTNAM & ROBERTS, Esqs.,
Attorneys for Appellee Marks,
40 Wall Street,
New York 5, New York.

Petition of Ennis M. Nichols, Read in Support of Foregoing Motion

(Record pages 7-14)

DISTRICT OF VIRGINIA
COUNTY OF ARLINGTON } ss.:
UNITED STATES OF AMERICA

ENNIS M. NICHOLS, being duly sworn, deposes and says:

I am one of the plaintiffs herein and acting chairman and member of the Committee of the Common Stockholders of the Long Island Lighting Company. Prior to and at the time of the enforcement order, I was the owner in my own right of 775 shares of the common capital stock of the original Long Island Lighting Company, being certificates Nos. CDC 74191 for 250 shares, 74234 for 500 and 74266 for 25 shares, which in 1955, I exchanged for stock of the new Company because I was told, not, however, by counsel for the Committee, that under the enforcement order, my accrued dividends would be cancelled unless I then made the exchange. The Committee was organized in 1947 after one of the stockholders of the Long Island Lighting Company had retained Harold G. Aron, as counsel upon then learning for the first time that proceedings had long been pending before the Public Service Commission and the Securities and Exchange Commission in an effort to undo the 1944 recapitalization which had been approved by the stockholders and the Public Service Commission and in effect to dissolve the Company without the knowledge or consent of its common stockholders who had the full voting power and thus to sell its assets to the Consolidated Edison Company for a small fraction of their true value. Mr. Aron advised the formation of the Committee and further advised the Committee, when organized, that in his opinion the Securities and Exchange Commission was devoid of

power to subject the Company to the PUHCA and that said power and jurisdiction could not be established under the act by the consent or acquiescence of the management of the Long Island Lighting Company. Acting on such advice, the Committee had its counsel confer with the Securities and Exchange Commission, then located in Philadelphia, and with the Public Service Commission in New York. Accordingly, the Committee challenged the jurisdiction of the SEC and still maintains that the Securities and Exchange Commission was without power to reorganize the Long Island Lighting Company as a completely intra-State New York corporation and maintain this position throughout the reorganization proceedings in which, in 1948, it was accorded, as a matter of grace, a "limited participation". Concerning this contention, the Court of Appeals in 1953, when dealing with the allowance of fees to counsel participating in the proceedings, said, in finding Mr. Aron's services non-compensable:

> "In the case at bar all the claims are limited to services rendered after June, 1948, when the 'Committee' was allowed to intervene; and by that time we had decided that the SEC was paramount, and the Supreme Court had refused to intervene. We may, of course, have been mistaken; but it should have appeared to Mr. Aron to the last degree unlikely that our ruling would not remain authoritative. * * *."

Confronted with the fact that the Court of Appeals had prior to its advent in the proceeding decided against this contention of the Committee, as indicated in the *ipse dixit* of Judge Learned Hand, it was clear to the Committee and counsel that the question of jurisdiction would probably eventually go to the Supreme Court and the Committee sought leave to solicit from the common stockholders it represented an advance of five cents a share to help meet

the unavoidable expenses of the Committee for expert witnesses and out-of-pocket expenses, not including counsel fees. (By various artifices, these defendants and Long Island Lighting Company have *thus far* and for more than a decade prevented any decision by the United States Supreme Court.)

The Committee on a single printed communication to the stockholders at the time of its organization received written proxies and authorizations to represent between one-third and one-fourth of the 12,000 common stockholders of record, which proxies are in my possession and have never been revoked as far as I know. SEC denied the Committee the right to communicate with these stockholders, from whom it held these proxies, for the purpose of making the solicitation above mentioned. The Committee appealed to the Court of Appeals in the District of Columbia and the Court divided with Judge Miller writing a strong dissenting opinion. Being without funds, the Committee was then unable to offer even a modicum of expert testimony and was limited to a single appearance of a few hours. No stockholders meeting having been had or called by the management, owning less than 1% of the Company's securities, since 1944, the Committee on the advice of counsel and pursuant to the Statute of the State of New York published a notice of stockholders meeting and endeavored to hold such meeting. Counsel for the Long Island Lighting Company threatened before the SEC hearing examiner to apply for an injunction and the Securities and Exchange Commission refused to approve the Committee's proposed proxy solicitation, naming a new Board of Directors. The Committee's counsel therefore agreed to any form of solicitation which the Commission desired and made repeated efforts to secure in some form the SEC's approval thereof. While these efforts were going on, the SEC suddenly and without prior warning handed down its find-

ings and immediately applied for and obtained an injunction which barred any further action by the Committee. SEC then brought on the findings in an application for an enforcement order before Judge Kennedy who, in a lengthy opinion, took the position that in view of the prior opinion of the Court of Appeals on the question of jurisdiction, he was bound to issue the enforcement order, although he himself had denied an injunction earlier applied for by the SEC through David K. Kadane, as its counsel, to enjoin the putting into effect the recapitalization of 1944 approved by the Public Service Commission. The Court of Appeals affirmed his decision in a lengthy opinion by Judge Swan, whereupon the directors, without notice to, knowledge or consent of stockholders surrendered LILCO's exemption from the Public Utilities Holding Act. When the enforcement order was appealed by the Common stockholders Committee to the Court of Appeals, that Court in its first opinion found error and remanded the proceedings to the District Court but two or three days later, on a chamber application by SEC, without any hearing, reversed its remand of the enforcement order and affirmed the enforcement order in June, 1950. Thereafter the Committee moved in 1952 the Court of Appeals to set aside its enforcement order on the ground that the Court had been misled by representations *"tantamount to fraud" by the Long Island Lighting Company, not these defendants, before the SEC as to its prospective earning power and depreciation reserve.* In that application, no mention of conspiracy or fraud, other than mere allusion above stated, was included in the petition of the Committee and no allegation or charge of conspiracy or fraud of any kind had been made in the reorganization proceedings before SEC, for the simple reason that the Committee was not informed thereof and had no means of discovering the same. However,

before its petition to the Court of Appeals in April 1952, a decision of the Public Service Commission of New York, in proceedings which were pending at the time, fixed a depreciation reserve of more than $3,000,000 below what the Company had claimed and on which SEC had based its findings. Likewise, before the 1952 petition to the Court of Appeals, the Company's earning statement for 1950 was reported and showed that at the time of the affirmance of the enforcement order, the Company was earning above $4,000,000 a year as against testimony given before the SEC and used as the basis of what the SEC referred to in briefs and arguments as its "informed guess" that its earnings would not exceed $3,500,000 annually—they have steadily climbed and have now reached more than three times that amount.

It was not until hearings before the SEC begun about a year after the Court of Appeals had affirmed the enforcement order on fee application hearings between April 17, 1951 and February 3, 1953, that it was revealed in documents and sworn testimony that there had been a conspiracy formed in 1944 on the part of the preferred stockholders to "invent" some fictitious ground of superseding the recapitalization of 1944 before the PSC, under which the common stockholders received just short of 50% of the common stock of the recapitalized Company and to induce the seizure of jurisdiction by the SEC and reduce their participation to 5%, which conspiracy was successfully consummated in the enforcement order six years later.

Upon the discovery of the incontrovertible evidence of conspiracy, much of which is documented, and the fact that David K. Kadane's employment by the SEC appears not to have been terminated when he was retained as attorney for the Long Island Lighting Company and in view of the immense growth of the Company's earnings as predicted by it in 1947, in complete stultification of the Com-

pany's representations in the reorganization proceeding, and the SEC findings, the Committee instituted an action for fraud and conspiracy against the Long Island Lighting Company. Judge Inch denied a motion for summary judgment and to dismiss the complaint as not stating any cause of action but the SEC came to the rescue of Long Island Lighting Company, intervened in the action and brought about its dismissal upon the ground that the beginning of the action was a violation of an injunction contained in the enforcement order. The Committee then instituted the present action which encountered a plea of *res judicata* by the defendants, relying upon the foregoing dismissal of the complaint against the Long Island Lighting Company. This motion was argued before Judge Galston who not only dismissed the complaint upon the grounds of *res judicata* but recommended that the Committee's attorneys be cited for contempt of court. The effort to have Committee's counsel punished for contempt of court had been made on behalf of the Long Island Lighting Company on three prior occasions. The Court of Appeals took four months to decide in a divided opinion that the dismissal of the complaint should be affirmed.

After this affirmance by the Court of Appeals, the Committee moved in the Court of Appeals for an order directing the defendants to answer the complaint, and for this Court to proceed to the trial with a jury of the issues of fraud and conspiracy set forth in the complaint. The action of the Court of Appeals on this motion is set forth in its opinion, attached to the notice of motion. An order was entered by the Court of Appeals in consonance with said opinion and I am informed by counsel that if a more explicit order is required by this Court, that a request therefor will be considered by the Court of Appeals, although it seems entirely clear that that Court having denied the motion to enjoin the plaintiffs from further pro-

Petition of Ennis M. Nichols, Read in Support of Foregoing Motion

ceedings and, having in its two most recent opinions expressed the view that they are entitled to present evidence of fraud and conspiracy that has never heretofore been received either by the SEC, this Court or any Court of Appeals, for the reason that no evidence of fraud and conspiracy was known to or discoverable by these plaintiffs until after the close of the proceedings before the SEC, after the enforcement order in the District Court and after its affirmance by the Court of Appeals therefrom. The incontrovertible fact is that the evidence and all of it which plaintiffs now desire to present, pursuant to the implied mandate of the latest opinion of the Court of Appeals, is in every sense after-discovered evidence, and has never before been offered or received in evidence before the SEC or in this or any related actions or proceeding. I challenge the defendants to deny this and their counsel to point out where in this prolonged litigation they have ever denied that such is the fact.

WHEREFORE, petitioner prays this Court to proceed to trial in accordance with the opinion on June 7th ult., of the Court of Appeals and to grant the relief prayed for herein and such other relief as to the Court may seem just and proper.

ENNIS M. NICHOLS.

(Sworn to June 22, 1956.)

Opinion of United States Court of Appeals, for the Second Circuit, Read in Support of Foregoing Motion

(Record pages 15-16)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 39—October Term, 1955

(Motion submitted May 7, 1956 Decided June 7, 1956)

Docket No. 23580

ENNIS M. NICHOLS, et al.,
Plaintiffs-Appellants,

v.

HARRY A. ALKER, et al.,
Defendants-Appellees.

Before:

FRANK, HINCKS, and WATERMAN, *Circuit Judges.*

On appellants' motion to vacate the judgment on the ground of fraud and appellees' motion to enjoin further proceedings on the part of appellants, petitions severally denied.

HAROLD G. ARON, Madison, Connecticut, for plaintiffs-appellants.

BERTRAM D. MOLL, Mineola, N. Y., for defendants-appellees.

PERCIVAL E. JACKSON, New York City, pro se.

Opinion of United States Court of Appeals, for the Second Circuit, Read in Support of Foregoing Motion

Per Curiam:

On February 14, 1956, we affirmed the dismissal of appellants' complaint by the District Court. A petition for rehearing was denied on March 13, 1956. Now appellants have moved for an order directing appellees to answer the complaint and for other relief. In effect, this is a second petition for rehearing. The motion is untimely and presents nothing not heretofore considered by us. Appellants' motion is therefore denied.

Appellees have filed a cross-motion seeking to enjoin appellants and their attorneys from taking any further steps in the within action and from instituting any further action or proceedings based on the allegations of the complaint in the within action. In our opinion of February 14, 1956, 231 F. 2d 68, we left it open to appellants, if so advised, to apply under Rule 60(b) to the enforcement court, the U. S. District Court for the Eastern District of New York, to reopen on the ground of after-discovered evidence of fraud. In order to succeed in reopening the reorganization proceeding, appellants must satisfy the trial court that they now have substantial evidence of fraud which was not obtainable by due diligence in time to present it either in the original reorganization proceedings or in the subsequent petition, filed in 1952, to reopen the reorganization proceedings; and that the petition attempting to reopen it made within a reasonable time as required by Rule 60. We indicated that, if such effort was made and denied, the District Court might then consider the appropriateness of enjoining further litigation: 231 F. 2d 68, 79-80. We adhere to these views. Appellees' motion for an injunction against further proceedings based on the allegations of the complaint herein is therefore denied.

Affidavit of Bertram D. Moll, Read in Opposition to Foregoing Motion

(Record pages 73-76)

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

BERTRAM D. MOLL, being duly sworn, says:

1. I am an attorney associated with David K. Kadane, attorney for eighteen of the persons named as defendants in the above action, and I am fully familiar with the facts hereinafter set out.

2. I submit this affidavit on behalf of all persons named as defendants herein (except Stack, who has not been served) in opposition to the motion of Ennis M. Nichols, purportedly in this action, that this Court "proceed to the trial of the issues of fraud and conspiracy, *as set forth in the complaint herein.*" (emphasis added).

3. The complaint alleges that the reorganization of Long Island Lighting Company (89 F. Supp. 513, *aff'd*, 183 F. 2d 45, *cert. denied*, 340 U. S. 834 (1950)) under the provisions of the Public Utility Holding Company Act of 1935 was fraudulently procured. This complaint has been dismissed by Judge Galston as *res judicata* and stricken as sham. 126 F. Supp. 679. The Court of Appeals (Judges Waterman, Hincks and Frank) unanimously affirmed, 231 F. 2d 68, since the issues here tendered by Mr. Nichols had all previously been tendered by him in the reorganization proceedings and in a later unsuccessful attempt by him to reopen the reorganization on the ground of fraud, 197 F. 2d 709; or might have been. 231 F. 2d at pp. 79, 81. In addition, and as the main basis for their affirmance, Judges Waterman and Hincks held that Mr. Nichols'

charges of fraud are cognizable (a) only in the reorganization proceeding, stating

> "* * * through the device of an apparently independent tort action, the plaintiffs below may not by-pass the Commission and the enforcement Court in an effort to alleviate their treatment under the plan approved by the reorganization decree." 231 F. 2d at p. 79.

and then (b) only if he can show

> "further justification than that shown in their present complaints and those heretofore dismissed * * *." 231 F. 2d at p. 79.

Mr. Nichols has petitioned the Supreme Court to review the dismissal of the complaint (United States Supreme Court, October Term, 1955, No. 1012), and this petition is pending.

4. In its opinion the Court of Appeals details the lengthy history of this and related earlier litigations waged by Mr. Nichols and his attorney, Mr. Aron, in their war against the reorganization. In those earlier litigations the Court of Appeals twice stated that no further proceedings should be taken by Mr. Nichols on the basis of the identical stale charges here made. *Nichols* v. *Long Island Lighting Co.*, 207 F. 2d 931, 934 (Judges L. Hand, A. N. Hand and Swan); 211 F. 2d 392, 393, *cert. denied*, 348 U. S. 827, *rehearing denied*, 348 U. S. 884.

5. Following the affirmance of the Court of Appeals, Mr. Nichols moved in that Court for the relief he here seeks, namely, for an order directing the defendants to answer the complaint, and directing this Court "to proceed with trial by jury of the issues presented by the pleadings"

Affidavit of Bertram D. Moll, Read in Opposition to Foregoing Motion

(Motion dated May 4, 1956). The Court of Appeals in a *per curiam* opinion denied the requested relief, expressly adhering to the views stated previously in the Court's affirmance of the dismissal, to wit:

> "Further, we think it proper to suggest that if the plaintiffs, unless they can show further justification than that shown in their present complaints and those heretofore dismissed, should make yet another motion for reopening to the enforcement Court, an order of denial be entered accompanied by an appropriate injunctive order directed to counsel as well as to plaintiffs restraining further litigation against the reorganized company and these individuals who directly or indirectly participated in its reorganization." 231 F. 2d at pp. 79, 80.

The *per curiam* opinion which is not reported, is annexed to Mr. Nichols' moving papers.

6. Mr. Nichols has made the present motion notwithstanding the striking of the complaint herein as sham, and the plain statements of the Court of Appeals that Mr. Nichols' charges of fraud are cognizable (A) only in the reorganization proceeding, and then (B) only if he can show "substantial evidence of fraud which was not obtainable by due diligence in time to present it, either in the original reorganization proceedings or in the subsequent petition filed in 1952, to reopen the consolidation proceedings," which, the Court held, this complaint does not do. It is because Mr. Nichols and his attorney persist in flouting these decisions that a motion is being made in the reorganization case, concurrently herewith, that Mr. Nichols and Mr. Aron be specifically enjoined from taking further proceedings based on this complaint, as suggested by the

Affidavit of Bertram D. Moll, Read in Opposition to Foregoing Motion

Court of Appeals. A copy of the affidavit of Bertram D. Moll dated July 12, 1956 in support of said motion is annexed hereto as Exhibit 1.

WHEREFORE, it is respectfully submitted that Mr. Nichols' motion should be dismissed.

/s/ BERTRAM D. MOLL.

(Sworn to July 12, 1956.)

Transcript of Hearing on Foregoing Motion

(Record pages 87-110)

(Same as printed herein at pages 13a to 28a.)

Order Appealed From in Action No. 14890

(Record, page 86)

Plaintiffs having moved on July 18, 1956, that this Court proceed to a trial of the issues of fraud and conspiracy set forth in the complaint herein, and it appearing that the said complaint has been dismissed and stricken as sham, and that the Court of Appeals has affirmed said dismissal, and that the Supreme Court of the United States has denied a petition by plaintiffs for a writ of certiorari to review said dismissal and upon the minutes of the hearing hereto attached, now therefore,

It is ordered that said motion be, and hereby is, in all respects denied.

/s/ M. T. Abruzzo,
United States District Court.

Dated: October 25, 1956,
Brooklyn, New York.

Notice of Appeal in Action No. 14890

(Record page 111)

NOTICE IS HEREBY GIVEN that Ennis M. Nichols, individually and on behalf of other stockholders of Long Island Lighting Company similarly situated and as Acting Chairman and Member of the Committee of the Common Stockholders Committee of Long Island Lighting Company, and Common Stockholders Committee of Long Island Lighting Company, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Order of this Court, entered in this action on the 25th day of October, 1956, which denied the plaintiffs' motion that this Court proceed to a trial of the issues of fraud and conspiracy set forth in the complaint herein.

HAROLD G. ARON,
Attorney for Plaintiffs,
Office & P. O. Address,
Madison, Connecticut.
New York City Address,
8300 Talbot Street,
Kew Gardens, L. I., N. Y.